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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 157

CIVIL AERONAUTICS BOARD,

Petitioner,

v.

STATE AIRLINES, INC.

Respondent.

No. 158

STATE AIRLINES, INC.

Cross-Petitioner,

v.

CIVIL AERONAUTICS BOARD and PIEDMONT AVIATION, INC.,

Cross-Respondents.

No. 159

PIEDMONT AVIATION, INC.,

Petitioner,

v.

STATE AIRLINES, INC.

Respondent.

BRIEF OF STATE AIRLINES, INC.

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November 15, 1949

SUBJECT INDEX

	PAGE
Preliminary Statement	1
Basis for Jurisdiction	2
Statement of the Case	3
A. State's Application and Evidence	4
B. Piedmont's Application and Evidence	7
C. The Disposition of the Case Made by the Board	10
D. The Reversal by the United States Court of Appeals for the District of Columbia Circuit	15
Specification of Errors Intended to Be Urged in No. 158	17
Summary of Argument	18
A. In No. 158	18
B. In Nos. 157 and 159	21
Argument	22
In No. 158	22
Point I—The Board, having exercised all of the discretion entrusted to it by Congress, there remained only the ministerial act of issuing a certificate of public convenience and necessity to State; such action should have been compelled by the court below	22
A. The Board has Exercised, in Favor of State, all of the Discretion Entrusted to it by Congress	22
B. The Court Below had Power to Compel the Board to Issue to State the Certificate of Public Convenience and Necessity to which It was Entitled under the Findings Made	28

PAGE

1. The language of the Administrative Procedure Act itself plainly confers power to grant the relief requested 28
2. The legislative history of the Act shows a Congressional intent to empower the courts to give the relief here sought 29
3. The authorities relating to mandamus show that the court below had power to grant the relief requested 34

C. Unless a Mandatory Order is Here Made, the Entire Judicial Review, Here Successfully Invoked, May Be a Meaningless Formality 40

In Nos. 157 and 159 44

Point II—The Court of Appeals was correct in determining that the Board had no statutory authority for issuing the certificate of public convenience and necessity to Piedmont which had not applied for the transportation covered by the certification 44

A. The Court Below Had the Power to Review the Board Orders 44

B. The Legislative Mandate Embodied in the Civil Aeronautics Act is Unambiguous and was Violated in Issuing the Certificate to Piedmont 45

1. The contention that the "modification" clause, or general prayer for relief, extended Piedmont's application to cover the transportation certificated is unsupportable 51
2. The Congressional standards must be applied, irrespective of the Board's contention that it desires a broader scope for its activities 57

(a) The Civil Aeronautics Act, as construed by the court below, does not place the Board in a procedural straightjacket 59

PAGE

(b) The decisions relied upon by respondents do not support their position 61

C. The Error of the Board is Emphasized by the Provisions Requiring Notice to All Interested Parties and Proper Hearings as a Condition to Issuing Certificates; Failure to Notify State of Piedmont's Unexpressed Aspirations Deprived State of a Hearing in Keeping with Standards of Due Process of Law 62

D. The Civil Aeronautics Board has Repeatedly Construed the Civil Aeronautics Act to Forbid the Issuance of Certificates for Routes not Covered by Applications Filed 65

Point III—In any event the decision below should be affirmed in Nos. 157 and 159, for the Board in deciding on the record before it that Piedmont was fit, willing and able to operate the transportation certified, acted arbitrarily, capriciously and in disregard of its own standards 68

Conclusion 76

Appendix A i

Extracts from Civil Aeronautics Act of 1938 as amended, 52 Stat. 977, 49 U. S. C. § 401, *et seq.* ... i

Extracts from Administrative Procedure Act of 1946, 60 Stat. 237, 5 U. S. C. § 1001, *et seq.* vii

Regulations of the Civil Aeronautics Board xi

Appendix B xvi

Map showing transportation covered by certificate and that applied for by Piedmont xvi

Map showing transportation covered by certificate and that included in State's application xvii

TABLE OF CASES

PAGE

All American Aviation, Combination Service, 8 C. A. B. 241 ..... 7, 74
All American Aviation, Pick-up, Delivery Service, 2 C. A. B. 133 ..... 7, 74
Alton R. Co. v. *United States*, 315 U. S. 15 61
American Export Air. Temporary New York-Foynes Ser., 3 C. A. B. 294 69
Arizona-New Mexico Case, 9 C. A. B. 85 ..... 60, 66
Ashbacker Radio Co. v. *F. C. C.*, 326 U. S. 327 43

Braniff Airways v. *Civil Aeronautics Board*, 79 App. D. C. 341, 147 F. 2d 152 69

C. & S. Airlines v. *Waterman Corp.*, 333 U. S. 103 44
Chicago, St. P., M. & O. Ry. Co. v. *U. S.*, 322 U. S. 1 ..61, 62
Cincinnati-New York Additional Service, 8 C. A. B. 603 .60, 66
Colonial Air. et al., Atlantic Seaboard Op., 4 C. A. B. 392 4
Colonial Air. et al., Atlantic Seaboard Op., 4 C. A. B. 552 ..... 54, 65, 66
Colorado-Wyoming Co. v. *Comm'n*, 324 U. S. 626 75

Davies Warehouse Co. v. *Bowles*, 321 U. S. 144 58
Delta Air, et al., Service to Atlanta and Birmingham, 2 C. A. B. 447 ..... 60, 65, 73

Eastern A. L. et al., Great Lakes-Florida, 6 C. A. B. 429 4

Fairbanks-Nome Intermediate Points Case, Docket No. 1973, et al., decided March 31, 1949 23-4
Federal Comm'n v. *Broadcasting Co.*, 309 U. S. 134 . . 3, 17, 20, 37, 38, 39
Federal Radio Comm'n v. *Nelson Bros. Co.*, 289 U. S. 266 69
Florida Case, 9 C. A. B. 444 65
Florida v. *United States*, 282 U. S. 194 75
Fly v. *Heitmeyer*, 309 U. S. 146 39

PAGE

Garfield v. *Goldsby*, 211 U. S. 249 35
Great Lakes Area Case, 8 C. A. B. 360 ..... 60, 66

Harrison v. *Northern Trust Co.*, 317 U. S. 476 30

Lane v. *Hoglund*, 244 U. S. 174 35
Local, Feeder, and Pick-up Air Service, 6 C. A. B. 1 .... 69, 71

McCracken v. *United States*, 47 F. Supp. 444 61
Middle Atlantic Area Case, 9 C. A. B. 131 ..... 55, 66, 71
Miguel v. *McCarl*, 291 U. S. 442 35
Mississippi Valley Case, 8 C. A. B. 726 66
Morgan v. *United States*, 304 U. S. 1 64

Nat. Broadcasting Co. v. *U. S.*, 319 U. S. 190 69
New England Case, 7 C. A. B. 27 ..... 54, 66
North Central Case, 7 C. A. B. 639 .... 54-5, 66, 69, 72, 73

Pacific Case, 7 C. A. B. 209 69
Panagra Terminal Investigation, 4 C. A. B. 670 55
Parish v. *MacVeagh*, 214 U. S. 124 35
Pennsylvania-Cent. Air., Youngstown-Erie-Buffalo Op., 1 C. A. A. 811 59
Public Service Com. v. *State, ex rel.*, 184 Ind. 273, 111 N. E. 10 36

Roberts, Treasurer v. *United States*, 176 U. S. 221 35
Rocky Mountain States Air Service, 6 C. A. B. 695 65-6

Securities Comm'n v. *Chenery Corp.*, 332 U. S. 194 42
Service to Newport News, Va. Case, Docket No. 3238, et al., decided September 15, 1949 (Mim. Op.) 42
State Airlines v. *Civil Aeronautics Board*, 174 F. 2d 510. 1

Texas-Oklahoma Case, 7 C. A. B. 481 72
Trans-Southern Air., et al., Amarillo-Oklahoma City Op., 2 C. A. B. 250 ..... 60, 65, 73

United A. L., et al., Youngstown, Ohio, Operation, 2 C. A. B. 543 59
U. S. v. *Carolina Carriers Corp.*, 315 U. S. 475 .... 57, 58, 75
United States v. *Dickerson*, 310 U. S. 554 30

PAGE

United States v. *Hines*, 70 App. D. C. 36, 103 F. 2d 737 35
United States v. *Mine Workers*, 330 U. S. 258 30
United States v. *Schurz*, 102 U. S. (12 Otto) 378 35
W. R. Grace & Co. v. *Civil Aeronautics Board*, 154 F. 2d 271 55
West Coast Case, 6 C. A. B. 961 ..... 54, 55, 66, 72
Wilbur v. *Krushnic*, 280 U. S. 306 35
Woko, Inc. v. *Federal Communications Commission*, 80 App. D. C. 333, 153 F. 2d 623 71

STATUTES AND REGULATIONS

Administrative Procedure Act of 1946 § 5 62
Administrative Procedure Act of 1946 § 10(e) ..2, 3, 16, 17 18, 19, 28, 29, 32, 33, 34, 37, 44
Civil Aeronautics Act of 1938 § 2 38
Civil Aeronautics Act of 1938 § 2(a) 43
Civil Aeronautics Act of 1938 § 2(f) 43
Civil Aeronautics Act of 1938 § 401 .....2, 3, 23, 45, 46, 47, 54
Civil Aeronautics Act of 1938 § 401(b) 45, 46, 62
Civil Aeronautics Act of 1938 § 401(c) 40, 46, 62
Civil Aeronautics Act of 1938 § 401(d) 18, 21, 23, 24, 25, 27, 50, 68
Civil Aeronautics Act of 1938 § 401(d)(1) 23, 46
Civil Aeronautics Act of 1938 § 401(d)(2) 19, 23, 46
Civil Aeronautics Act of 1938 § 401(e) 56
Civil Aeronautics Act of 1938 § 401(f) 47, 62
Civil Aeronautics Act of 1938 § 401(h) 24, 55, 60
Civil Aeronautics Act of 1938 § 401(m) 40, 74
Civil Aeronautics Act of 1938 § 406 74
Civil Aeronautics Act of 1938 § 406(a) 40
Civil Aeronautics Act of 1938 § 406(b) 40
Civil Aeronautics Act of 1938 § 1006 44
Communications Act of 1934, as amended 37

PAGE

Economic Regulations of Civil Aeronautics Board, § 238.1, Amendment 3, Fed. Reg. Vol. 8, No. 177, p. 12257-8 . . . 47, 54
Motor Carrier Act of 1935 . . . . . 57, 61, 62
49 Stat. 543 57
52 Stat. 980 . . . . . 38, 43, 68
52 Stat. 987 . . . . . 2, 14, 23, 40, 45, 56, 60
60 Stat. 237 16
60 Stat. 239 62
60 Stat. 243 . . . . . 2, 16, 17, 19, 28
5 U. S. C. § 1004 62
5 U. S. C. § 1009(e) 2, 16, 17, 19, 28
28 U. S. C. § 1254(1) 2
47 U. S. C. § 151 37
47 U. S. C. § 402 39
49 U. S. C. § 306 61
49 U. S. C. § 308(a) 62
49 U. S. C. § 402 . . . . . 38, 68
49 U. S. C. § 402(a) 43
49 U. S. C. § 402(f) 43
49 U. S. C. § 481 . . . . . 2, 23, 45
49 U. S. C. § 481(c) 40
49 U. S. C. § 481(d)(1) 14
49 U. S. C. § 481(d)(2) 14
49 U. S. C. § 481(e) 56
49 U. S. C. § 481(h) 60

MISCELLANEOUS AUTHORITIES

---

11 Air L. R. 405 59
Congressional Record, Vol. 92, Part 2 . . . . . 30, 31, 32, 33-4
Congressional Record, Vol. 92, Part 5 . . . . . 30, 31, 32-3

PAGE

Federal Administrative Procedure Act and the Administrative Agencies—With Notes and Institute Proceedings (N. Y. Univ. School of Law Institute—Proceedings, Vol. VII) p. 139 24
John H. Frederick, *Commercial Air Transportation*, Rev. Ed. (1946) 67
III House Miscellaneous Reports, 79th Cong., 2nd Sess., Rep. No. 1980 ..... 30, 31
39 Op. Atty Gen'l 442 56
Oxford English Dictionary (1933) 53
Powell, *Construction of Written Instruments*, 14 Ind. L. J. 309 30
2 Vom Bauer, *Federal Administrative Law* § 564 75
2 Vom Bauer, *Federal Administrative Law* § 568 75
Webster's New International Dictionary, 2nd Ed., 1943 53

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

CIVIL AERONAUTICS BOARD, *Petitioner,* v. STATE AIRLINES, INC., *Respondent.*	No. 157
STATE AIRLINES, INC., *Cross-Petitioner,* v. CIVIL AERONAUTICS BOARD and PIEDMONT AVIATION, INC., *Cross-Respondents.*	No. 158
PIEDMONT AVIATION, INC., *Petitioner,* v. STATE AIRLINES, INC., *Respondent.*	No. 159

BRIEF OF STATE AIRLINES, INC.

Preliminary Statement

This case is here on writs of *certiorari* to the Court of Appeals for the District of Columbia Circuit. The decision below is not yet officially reported but is unofficially reported in 174 F. 2d 510, under the title of *State Airlines* v. *Civil Aeronautics Board* and appears in the printed record at p. 675.

The substantive portion of the decision below was in favor of State Airlines, Inc. (hereinafter referred to as "State"). The Court of Appeals decided, on State's petition for review of Civil Aeronautics Board orders, that Piedmont Aviation, Inc. (hereinafter referred to as "Piedmont"), had not filed an application for the transportation covered by the certificate of public convenience and necessity awarded to it by the Civil Aeronautics Board (hereinafter referred to as the "Board"), and that the Board, accordingly, had no power under the statute to certificate Piedmont.

The Board, in No. 157, and Piedmont, in No. 159, petitioned for writs of *certiorari*.

State's cross-petition (No. 158) is addressed to the failure of the court below to make an order* requiring the Board to issue to State the certificate to which, in view of the findings of fact, it was entitled under the mandatory provisions of Section 401 of the Civil Aeronautics Act.**

Pertinent statutory provisions and Board regulations are annexed hereto as Appendix A.

Basis for Jurisdiction

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254 (1). The decision and judgment, to which the writs of *certiorari* in this proceeding are directed, were entered on April 6, 1949. The cross-petition for writ of *certiorari* was filed on July 2, 1949. This Court granted the cross-petition on October 10, 1949.

State's cross-petition is addressed to that portion of the decision below in which the court held (R. 686),*** in spite of Section 10(e) of the Administrative Procedure Act of 1946,

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*See Section 10(e) of the Administrative Procedure Act of 1946; 60 Stat. 243; 5 U. S. C. § 1009(e); Appendix A, p. X, *infra*.

**52 Stat. 987; 49 U. S. C. § 481; Appendix A, p. II, *infra*.

***This type of citation is to the printed record.

that it lacked "power to order the issuance of a certificate which the Board has declined to issue", even assuming that the Board had "already made the requisite findings which would entitle State to a certificate". The court attributed its impotence in this regard to *Federal Comm'n* v. *Broadcasting Co.*, 309 U. S. 134.

This determination presents (a) a question of general importance, and (b) a question of substance relating to the construction of a statute of the United States. These matters have not been passed upon by this Court but should be settled by its decision. The construction of Section 10(e) of the Administrative Procedure Act and the interpretation of *Federal Comm'n* v. *Broadcasting Co.*, 309 U. S. 134, in the light of that act, particularly call for determination by this Court.

Statement of the Case

This case involves the certification under Section 401 of the Civil Aeronautics Act of passenger, mail and property service by plane from the Coastal and Piedmont region of Virginia and the Carolinas westerly across the Appalachian Mountains to the industrial Ohio River Valley of the middle west (see maps in the opinion below,* R. 676).

The routes included in State's application (R. 20-3) upon which State went before the Examiners and the Board (R. 508-9) extended from Norfolk, Va. and New Bern-Morehead City and Wilmington, N. C., in the east to Cincinnati, O., and Louisville, Ky., in the middle west. These are the routes for which the Board found public convenience and necessity and which it then certificated to Piedmont, although the latter had not applied for such routes at all.

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*These maps, with the original legends used by State in the court below, are reproduced herein as Appendix B, pp. XVI-XVII, *infra*.

A. State's Application and Evidence.

On October 21, 1941, State filed with the Civil Aeronautics Board its original application for a certificate of public convenience and necessity authorizing local mail, passenger and property transportation connecting points in southeastern United States with points across the Appalachian Mountains in the Ohio River Valley and the Great Lakes Basin (Tr. 16740).* The Board, for one reason or another, postponed consideration of State's original application for some years.** As a result of Board action, State filed various other applications all of which, however, retained the basic east-west route system connecting southeastern points with the Ohio Valley cities across the Appalachian Mountains (R. 1-26). As the Board awarded the routes which had been applied for by State to others, State's chances of success became more local and restricted. State finally went to the hearings here involved before the Board's trial examiners on the basis of the route system above described connecting the Coastal and Piedmont regions of the Carolinas and Virginia with terminal points of Cincinnati and Louisville on the western side of the Appalachian range (R. 508-9; see maps, R. 676 and App. B, pp. XVI-XVII, *infra*).

At the hearings conducted by the examiners, State introduced voluminous exhibits intended to prove that public convenience and necessity required the routes applied for and that State was fit, willing and able to serve these routes. The exhibits set forth the economic strength and resources of terri-

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*This type of citation is to the unprinted certified transcript of record to which the parties, pursuant to stipulation, may make reference (R. 689).

**See *Colonial Air. et al., Atlantic Seaboard Op.*, 4 C. A. B. 392, 399-400, and *Eastern A. L. et al., Great Lakes-Florida*, 6 C. A. B. 429, 452-4.

tory to be served (State's Exhs. 3-11, R. 72-3, 115-9), the existing and proposed transportation facilities in this territory (State's Exhs. 12-18, R. 73, 120-34), data relating to airmail and first class mail in this territory (State's Exhs. 19-21, R. 73-4, 134-7), the traffic potential in the territory (State's Exhs. 22-31, R. 74, 137-40), plans for operation with approved multi-motored aircraft, including proposed schedules, revenue estimates, cost estimates, airmail estimates, detailed weather and airport data, and a tremendous amount of other data relating to the proposed operations and State's fitness and ability to operate over the routes in question (State's Exhs. 32-66, R. 75-7, 140-204), maps (State's Exhs. 67-71, R. 77, 204) and miscellaneous matters (State's Exhs. 76-82, R. 78, 206-20). All emphasized and amplified State's application for routes from Virginia and the Carolinas west across the mountains to the cities in the Ohio River Valley.

Thus, in its narrative statements introducing exhibits to show that public convenience required the routes in question, State said (R. 115):

> "Largely because of the nature of the Appalachian mountain range, which lies athwart this region in a north-east and south-west direction, and of the peculiarities of its drainage, land routes of travel and traffic developed predominantly in directions parallel to the mountains. This situation has left the Piedmont area of the Southeast, lying next to the mountains, with highly inferior connections both with the area lying west of the mountain range and with the Seaboard cities to the East and Southeast. *Since the proposed routes of State Airlines are largely designed to rectify this condition,** the population figures and the figures for economic characteristics of the entire area to be served are

*Emphasis ours throughout unless otherwise indicated.

presented by regional sub-divisions of the entire area as follows:

* * *

(R. 120):

> "The large degree of isolation of the cities of the Piedmont from one another and from both cross-mountain and seaboard points is revealed by statistics of existing transportation facilities in the area. . . .
>
> "Existing surface transportation across the mountains is so circuitous and so slow as to make State's proposed times by air seem phenomenally low when compared with the best one can do by surface carrier. . . ."

Consequently, the routes proposed by State were "predominantly * * * at right angles to the Appalachian Mountain Range" (R. 245) and their "main purpose" was "to provide a hitherto unfilled need for trans-mountain transportation" (R. 234). The need for such service was emphasized by State's economic expert who amplified the geographical difficulties created by the Appalachian Mountain Range and demonstrated the inability of surface transportation to meet the need of communication between cities such as Cincinnati and Louisville and the southeastern cities on the other side of the mountains (R. 213-20). The problem as this witness saw it was "one of a region, isolated from another important region, and without important traffic channels" (R. 217) and the witness was of the opinion that (R. 217):

> "Between the midwest and the southeast there ought to be and there are strong bonds of economic interest that need little for their development except physical means of communication."

Other evidence presented by State dealt with its fitness, willingness and ability to operate over the routes applied for, its

history and its financial ability (R. 79-109; State's Exhs. 72-5, R. 204-6; State's Exhs. 60-6, R. 189-204; R. 221-44; 248-77).

A detailed description or consideration of this evidence is unnecessary for the Board resolved all factual questions to which this evidence was addressed in State's favor by finding that State was fit, willing and able to operate as required by the statute and that the routes here involved for which State had applied were required by the public convenience and necessity (R. 565 [888, 892-3, 895-6, 901-2]; R. 612).

B. Piedmont's Application and Evidence.

Some three years after State's original application was filed, Piedmont, on June 2, 1944, filed its first application with the Board (R. 31-41). By this application, it sought a certificate to carry on a combined mail, passenger and property service with pick-up service* over routes having no particular axis but constituting a very local network covering nearly all towns in North Carolina and a substantial number of towns in South Carolina and Virginia (*ibid.*). Piedmont's proposed routes extended slightly into Georgia, Maryland, Tennessee and Virginia and one route extended through West Virginia along the Ohio River Valley to Cincinnati.

Before any hearings were held on Piedmont's application Piedmont, on March 8, 1945, by amendment abandoned it (R. 62-70). Apparently anticipating the Board's decision referred to in the footnote below, that a combination of pick-up

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*"Pick-up Service" is service of points without stops whereby mail is picked up from a ground installation by a device on the plane, while in flight (*All American Aviation, Pick-up, Delivery Service*, 2 C. A. B. 133, 137, fn. 3). This service needs no airports except the termini and is obviously unsuited for passengers and conventional transportation of property. The Civil Aeronautics Board has held that the combination of pick-up and passenger service is unsafe and will not be authorized (*All American Aviation, Combination Service*, 8 C. A. B. 241, 242).

and passenger service is unsafe and would not be authorized, Piedmont separated its amended application into two distinct parts (R. 64-70). It sought authority to transport mail, express and property using the pick-up method on most of the routes requested and entirely separate and distinct authority to transport mail, passengers and property in the conventional manner on different proposed routes (R. 64-70).

By this amendment, Piedmont expressly limited its application to carry passengers, mail and property in the conventional manner to routes designed to connect points *east* of the Appalachians with other points on the *same* side of the mountains, running (1) from Washington, D. C., to Hagerstown, Md., then through the Shenandoah Valley to Roanoke, Va., and ultimately to Columbia, S. C., and other South Carolina points; (2) from Norfolk, Va., to Roanoke, Va., and (3) from Wilmington, N. C., to Knoxville, Tenn. (R. 69-70; see map, R. 676 and App. B, p. XVI, *infra*).

The only passenger routes applied for by Piedmont (R. 69-70), aside from some very local service mostly in the Carolinas, thus had a predominantly north and south axis paralleling existing surface transportation facilities and were intentionally confined to the area east of the main Appalachian range (R. 416-8, 489; R. 676; State's Exh. 82, R. 215). Even the one route leading into the mountains, that is the one to Asheville and Knoxville, paralleled the only existing surface transportation in that direction (R. 213-4; R. 432).

As Piedmont pointed out in one of its briefs before the Board's examiners (R. 489) "The passenger routes proposed by Piedmont are along routes of established movement as shown by highway and rail figures."

Indeed, by reason of the type of service which Piedmont proposed to render, its counsel emphasized in argument before

the Board the non-mountainous character of terrain covered by Piedmont's principal passenger route, stating (R. 553):

> "Consider how this route as proposed by Piedmont connects Charlotte with its secondary centers, both north and south, and how north of Winston Salem it follows the Shennandoah [sic] Valley, crossing the Blue Ridge Mountains *at only one point, the southernmost end of those mountains where they are very low.*"

Even Piedmont's application for pick-up service (R. 64-9), which has no relevancy in this controversy relating to passenger, mail and property certification, abandoned any pretense of connecting southeastern points with the Ohio Valley cities across the Appalachian Mountains, although one insignificant segment of the proposed pick-up web did reach Charleston, W. Va. (R. 64-9).

Piedmont did not propose to fill the need for cross-mountain transportation between Cincinnati and Louisville in the Ohio Valley and the southeastern cities of Virginia and North Carolina. It sought merely to supplement existing surface transportation east of the mountains and to serve, as its expert witness said, "The general trend of movement * * * in this region, [which] is towards the *northeast* where the great centers of population and of industry are found" (R. 418).*

The prosecution of Piedmont's application was strictly limited to its application (R. 283-474). Piedmont introduced no evidence as to public convenience and necessity for transportation between the Carolinas and Virginia and Ohio River Valley points. It introduced no evidence as to its fitness or

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*It is not without significance, to prove that Piedmont did not deem itself an applicant for the routes covered by State's application, that Piedmont employed the same economic expert who had testified for State in support of its application (R. 212 and 416).

ability to operate such transportation. It offered no plan for such operation. It introduced no schedules and no evidence of financial ability to operate such routes. It furnished no estimates as to mail pay subsidy which it would require to operate the routes certificated. It made no cost estimates based upon the operation of multi-motored aircraft which would be required over the mountainous terrain in question but limited all its evidence to a proposed single-engined aircraft* (R. 368) to be operated on its north and south routes which, as its counsel emphasized, avoided the mountains (R. 553). For the same reason its plan of operation did not call for the utilization of radio guides (*cf.* R. 156-8, 221-2 with R. 378-80) and contemplated only daylight contact flight over the relatively level ground to be encountered (R. 368, 442).

As the court below concluded (R. 684):

> "In the instant case, we have presented the still stronger situation wherein, even at the time of the Board's finding that Piedmont was fit, willing, and able, there was *no* evidence of Piedmont's appropriate qualification for the awarded routes." [Emphasis in original although not in reprint in this record; see also 174 F. 2d at p. 517.]

C. The Disposition of the Case Made by the Board.

The evidence submitted by State and Piedmont to which reference has above been made was finally submitted to the trial examiners at hearings held in the summer of 1945 in a proceeding which, pursuant to Board order (R. 27), consoli-

*The aircraft proposed was a single-engined Noorduyn Norseman V (R. 368) which at the time of the hearings before the Board (R. 460) and, indeed, to the present time, has never received an air-worthiness certificate for scheduled passenger operation. Contrast this with State's plans based upon the standard air line Douglas DC-3 plane to be operated in accordance with accepted practice (R. 105-9, 221-2).

dated all of the applications then on file with the Board relating to the entire southeastern portion of the United States.

After consideration of all of the evidence, the examiners in their report concluded that State's proposal was to be recommended (R. 508-11, 513-6, 521-2). The report discussed the barrier which the Appalachian Mountain Range had presented to the development of transportation facilities in an easterly and westerly direction in the area proposed to be served by State (R. 508-9). The examiners commented upon State's fitness, willingness and ability to conduct the transportation in question, about its choice of DC-3 planes, its cost statistics and other evidence presented in that connection (R. 509-11, 514). After disposing of the applications of several other companies which had sought certificates in the general area, the examiners concluded that State should be recommended to conduct certain operations in the Carolinas and should be awarded the route across the mountains to Louisville, Ky. (R. 515-6, 521-2).

The examiners found that "the record shows a need for substantially all of the routes proposed by State" (R. 514). But they did not recommend certification of all the routes either to State or, indeed, in some instances to anyone (see R. 514-6, 519-24).

The examiners awarded to Piedmont a part of its predominantly north and south route paralleling the mountains from Winston-Salem to Washington and the branch route from Roanoke to Norfolk in Virginia (R. 518-9, 520).

State, Piedmont and Public Counsel (as well as other participants in the hearings) filed exceptions to the examiners' report. State excepted generally to the failure of the examiners to recommend its entire integrated system of east-west routes and excepted specifically to the failure to recommend for

State the route from Cincinnati to Norfolk, Louisville to Norfolk and Charlotte, N. C., to Chattanooga, Tenn. (R. 528-31). Public Counsel sided substantially with State in connection with these exceptions (R. 535-7, 549, 550).

Piedmont's exceptions dealt only with the failure to extend its north-south route southerly from Winston-Salem to Chester and Camden and to the failure to recommend its route from Wilmington, N. C., to Asheville and Knoxville, Tenn. (R. 533-4).* It filed no exceptions relating to the trans-Appalachian service here involved.

Upon argument before the Board, no one, least of all Piedmont, took the position that Piedmont should be awarded the certificate for the trans-Appalachian transportation covered by State's application (R. 551-64).

Upon this record and upon these contentions the Board found in substance that public convenience and necessity required the certification of the very routes for which State had applied, found that State was fit, willing and able to serve these routes (R. 612), but awarded the certificate therefor entirely to Piedmont.

Thus, the Board concluded, almost in the exact language of State's evidence (R. 565 [892**]):

> "Our study of the record leads us to the conclusion that local service connecting cities in the Piedmont area with Louisville and Cincinnati is justified. There is also a need for a route between Cincinnati and Norfolk via various intermediate points, and a route from Roanoke to Danville, Greensboro, Raleigh, Fayetteville, and Wilmington.
>
> * * *

*Piedmont's exception (R. 534) to the failure to recommend it for a "pick-up" service certificate is not here material.

**As the Board's decision has been bound into the record at page 565 thereof, the page citations apply likewise to the Board's reported decision in 7 C. A. B.

"This evidence shows the lack of sufficient main arteries of traffic in an east-wind direction, ...

* * *

"Transappalachian railroad and highway crossings to the Piedmont and Coastal Plain areas from the west are particularly circuitous and inadequate * * * Moreover, the existing transportation pattern leaves the region east of the mountains isolated from the west and important points within this region without adequate connections among themselves."

The Board then discussed (R. 565 [893]) the evidence furnished by State (R. 120-8) to indicate in detail the inadequacy of rail service in an easterly and westerly direction between trans-Appalachian points and the Piedmont. The Board further elaborated to a considerable extent on the establishment of service between the Piedmont area and Louisville and Cincinnati and commented on the "strong community of interest", between Louisville and the cities in the Piedmont as well as the "substantial community of interest * * * between Cincinnati and Norfolk" (R. 565 [893, 894-5]).

Concluding as required by the statute that public convenience and necessity required the east-west transportation here involved (R. 565 [895-6]), the Board turned to the selection of the carriers to be certificated. The Board rejected summarily the applications of six companies seeking certificates for local service. It then concluded (R. 565 [901]):

"The choice has thus narrowed down to State Airlines and Piedmont Aviation, and which of these two companies should be selected to conduct the proposed service presents a close and difficult question. Both have engaged in various phases of aeronautics for a period of years.

* * *

> "Each applicant has shown an adequate financing program, and each has demonstrated an energetic interest in the conduct of the operations."

The Board selected Piedmont principally because it had conducted certain pilot training programs and had engaged in other fixed base activities, whereas State had concentrated on charter operations and thus did not have as large a staff. The Board added, however, that there was no doubt that State could obtain the requisite personnel but the Board was of the opinion that inauguration of service might take State somewhat longer* (R. 565 [902]).

State thereupon filed its petition for rehearing (R. 566) specifically contending that the Civil Aeronautics Board could not legally certify Piedmont because it did not meet the requirements of the Civil Aeronautics Act in that (a) Piedmont had not applied for the routes awarded to it;** (b) it had not furnished any evidence or plan for such transportation and had failed to demonstrate its fitness as a scheduled carrier in many other respects, and (c) the certification of Piedmont violated due process of law for no notice had been given to anyone that Piedmont was to be considered an applicant for the trans-Appalachian routes awarded to it.

The Civil Aeronautics Board, however, adhered to its original decision (R. 610), but in so doing emphasized that it had

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*The Board's decision was made on April 4, 1947, six years after State's original application. The sudden emphasis upon speed in commencing operation is hard to understand even if the Board's conclusion in this respect had been correct (a conclusion which State contends was baseless).

**The statute under which the Board purported to act limits the Board's power to the issuance of a certificate "authorizing the whole or any part of the transportation *covered by the application* * * *" (49 U. S. C. § 481[d][1], [2]; 52 Stat. 987; App. A, pp. II-III, *infra*).

found State fit, willing and able to conduct the transportation in question. Thus, the Board said (R. 612):

> "State's ability to build up a qualified organization is not questioned. That it could do so was implicit *in the finding that the carrier was fit, willing, and able.*"

D. The Reversal by the United States Court of Appeals for the District of Columbia Circuit.

Upon appeal by State, the Court of Appeals (Judge Edgerton dissenting without opinion) reversed the Board's determination (R. 675).

The court stated that its decision depended "upon the answers which must be given the following two questions: (1) was Piedmont, at the time of the Board's decision, an applicant for the routes it was ultimately awarded; and (2) if not, can the Board award a certificate to one who was not an applicant for the routes authorized by that certificate?" (R. 679). The court answered both questions in the negative (R. 686). In considering the second question the court incidentally ruled that the Board's findings, as to Piedmont, were arbitrary and capricious and lacked the support of substantial evidence (R. 686). Indeed, as to the Board's conclusion that Piedmont was fit, willing and able to operate the routes certified, the court held that such conclusion was "not only unjustified on the basis of the record, but unjustifiable" for "there was no evidence of Piedmont's appropriate qualification for the awarded routes" (R. 683, 684). Accordingly, the court reversed "the decisions of the Board insofar as they resulted in the granting of a certificate to intervenor herein, Piedmont" (R. 686).

The remand of the case to the Board was "for further proceedings not inconsistent with this opinion". (R. 686).

The court below specifically denied State's request made pursuant to Section 10(e) of the Administrative Procedure Act of 1946* for an order compelling the Civil Aeronautics Board to issue a certificate of public convenience and necessity, either temporary or permanent, to State. On this score, the court said (R. 686):

> "Petitioner, State, also asks that this court reverse and remand to the Board with instructions to issue a certificate to State. Whether or not it is so that the Board has already made the requisite findings which would entitle State to a certificate, we agree with respondent that this court lacks the power to order the issuance of a certificate which the Board has declined to issue. We do not read the allegedly pertinent section of the Administrative Procedure Act with its mandate that this court shall 'compel agency action unlawfully withheld,' [Section 10(e), 60 Stat. 243 (1946), 5 U. S. C. § 1009(e) (1946)] as requiring that result. On the contrary we regard ourselves bound in this respect by the decision of the Supreme Court in Federal Communications Commission v. Pottsville Broadcasting Co. [309 U. S. 134, 60 Sup. Ct. 437, 84 L. Ed. 656 (1940)]."

It is this portion of the decision below which is the subject matter of the present cross-petition.

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*60 Stat. 237, 243, 5 U. S. C. § 1009(e); App. A, p. X, *infra*. This section provides that a court having jurisdiction to review the action of an administrative agency "shall (A) compel agency action unlawfully withheld or unreasonably delayed" as well as "(B) hold unlawful and set aside agency action, findings, and conclusions found to be" arbitrary, capricious, contrary to law, including constitutional provisions, lacking in proper procedure required by law, unsupported by substantial evidence, or unwarranted by the facts.

Specification of Errors Intended to Be Urged in No. 138

The United States Court of Appeals for the District of Columbia Circuit

1. erred in refusing to make an order compelling the Civil Aeronautics Board to issue to State a certificate of public convenience and necessity, either permanent or temporary, for the transportation found by the Board to be necessary for the public convenience;

2. erred in holding and adjudging that it lacked the power to make an order compelling the Civil Aeronautics Board to issue to State a certificate of public convenience and necessity, either permanent or temporary, for the transportation found by the Board to be necessary for the public convenience;

3. erred in holding and adjudging that Section 10(e) of the Administrative Procedure Act of 1946 [60 Stat. 243; 5 U. S. C. § 1009(e)] did not empower it to make an order compelling the Civil Aeronautics Board to issue to State a certificate of public convenience and necessity, either permanent or temporary, for the transportation found by the Board to be necessary for the public convenience;

4. erred in holding and adjudging that *Federal Comm'n* v. *Broadcasting Co.*, 309 U. S. 134, applied to the instant case and was a binding adjudication that the United States Court of Appeals lacked power to make an order compelling the Civil Aeronautics Board to issue to State a certificate of public convenience and necessity, either permanent or temporary, for the transportation found by the Board to be necessary for the public convenience;

5. erred in holding that it did not have power in a case where the Civil Aeronautics Board had exercised all discretion entrusted to it by the applicable act of Congress to make an order compelling such administrative agency to issue to State the certificate of public convenience and necessity to which it was entitled under the act of Congress by virtue of the findings of fact made by the Board.

Summary of Argument

A. In No. 158

State's basic contention rejected by the court below is that where the Board has made the requisite findings under the statute entitling State to a certificate of public convenience and necessity, the court has the power and duty under Section 10(e) of the Administrative Procedure Act of 1946 to compel the Board to issue the certificate to State. The logical progression of the argument is as follows:

1. The Board found that transportation covered by the application filed by State was required by public convenience and necessity (R. 565 [892-6]; map No. 2, R. 676; R. 1-26).

2. The Board found State fit, willing and able to conduct the transportation in question (R. 612; R. 565 [901]).

3. Under the statute [Civil Aeronautics Act, § 401(d)]* the Board had no further discretion to exercise. That statute provides that where public convenience and necessity have been found and where the applicant has been found to be fit, willing and able, the Board "shall" issue

*App. A, pp. IIIII, *infra*.

the certificate (provided, as in this case, that the application covers the transportation for which public convenience and necessity has been found). The Board's only alternative in a case such as the present one, where the application is for both a permanent or temporary certificate, is under Section 401(d)(2) of the Civil Aeronautics Act under which the Board may issue a temporary certificate. One or the other the Board must do.

4. As the Board, by its own findings as to the public convenience and necessity of the transportation in question and State's fitness, willingness and ability, has exhausted all of the discretion which Congress has conferred upon it, there remains only the ministerial act of issuing either a permanent or temporary certificate. Such ministerial action must be compelled by the courts if application is made under Section 10(e) of the Administrative Procedure Act, for that act, in turn, not only empowers the court to act in this situation but states that the court "shall (A) compel agency action unlawfully withheld or unreasonably delayed" (60 Stat. 243; 5 U. S. C. § 1009[e]; App. A, p. X, *infra*).

The power thus specifically conferred upon the courts by an act of Congress is akin to the power which the courts have long exercised to compel, by mandamus or other peremptory order, ministerial action by an administrative agency which has made findings in favor of a petitioner but has refused to perform the ministerial action which Congress specified should follow as a consequence of the findings made.

The legislative history demonstrates that the power conferred by the Administrative Procedure Act encompasses the relief here requested.

State is entitled to the mandatory order even if it be assumed *arguendo* that the Civil Aeronautics Act permits the Board as between competing applicants all of whom have been found fit, willing and able, to choose the most able. The Board in that event has likewise made the choice in State's favor. The Board, *qua* State, has exercised its discretion by eliminating every other *applicant* for the local routes here sought (R. 565 [896-901]). The Board stated (R. 565 [901]):

> "The choice has thus narrowed down to State Airlines and Piedmont Aviation, and which of these two companies should be selected to conduct the proposed service presents a close and difficult question."

As the court below held that Piedmont was not an applicant within the statute, Piedmont is eliminated as a matter of law. Thus, again, upon the Board's own findings of fact, State is left as the only applicant fit, willing and able to perform the transportation for which public convenience and necessity was found. Under this theory also, therefore, State is entitled to an order under the Administrative Procedure Act compelling the Board to issue to it the certificate which has been unlawfully withheld.

Decisions such as *Federal Comm'n* v. *Broadcasting Co.*, 309 U. S. 134, upon which the court below relied, are not in point for there the administrative agency had not made a finding that the applicant was fit, willing and able but had made the contrary finding. New findings of fact were required before the duty to issue a certificate arose. But if *Federal Comm'n* v. *Broadcasting Co.* is deemed to stand in the way of a mandatory order here compelling the Board to do its statutory duty, then, it is submitted that the subsequent enactment of the Administrative Procedure Act renders that decision inapplicable.

B. In Nos. 157 and 159

The Court of Appeals was correct in determining that the Board had no statutory authority for issuing the certificate of public convenience and necessity to Piedmont which had not applied for the transportation covered by the certification. The Board's orders issuing the certificate were subject to judicial review to assure application of the standards Congress had laid down for such action.

Congress, by subsection (d) of Section 401 of the Civil Aeronautics Act, limited the power of the Board to issue certificates to those authorizing "the whole or any part of the transportation covered by the application". As Piedmont had not applied for the transportation certificated, the Board's action in issuing the certificate was in direct violation of the statute.

The decision of the Court of Appeals on this score did no more than apply standards plainly laid down by Congress; these standards must govern even if the Board feels that it could function more efficiently in disregard of the Congressional limitation. In fact, however, the Board is not hampered by the limitation for Congress has conferred upon the Board ample power to carry out its duties in compliance with the legislative mandate.

If the Board were permitted, contrary to the Congressional mandate, to issue certificates for transportation not covered by the application, then the provisions for notice to other applicants, existing carriers, the Post Office Department and other interested persons would be completely meaningless, for no one would be advised of the scope of the issues presented by the application. The lack of any notice that Piedmont was a candidate for the route certificated to it, seriously prejudiced State in the present case and denied to State procedure required by law.

That the Board lacked authority to award the certificate to Piedmont is likewise established by the Board's own decisions under the Act uniformly rejecting applications which do not specifically cover substantially the routes found to be necessary; the Board has taken such action in spite of the annexation to applications of so-called "catch-all" clauses far more comprehensive in scope than the "modification" phrase in the Piedmont application upon which reliance is now placed to enlarge the latter's scope.

In any event, the Board's action was arbitrary and capricious and the Board's conclusions were unsupported by findings or any substantial evidence for Piedmont did not adduce any plan of operation to show that it was fit, willing and able to operate the trans-Appalachian—Ohio Valley routes certificated to it.

ARGUMENT

In No. 158

POINT I

THE BOARD, HAVING EXERCISED ALL OF THE DISCRETION ENTRUSTED TO IT BY CONGRESS, THERE REMAINED ONLY THE MINISTERIAL ACT OF ISSUING A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY TO STATE; SUCH ACTION SHOULD HAVE BEEN COMPELLED BY THE COURT BELOW.

A. The Board has Exercised, in Favor of State, all of the Discretion Entrusted to it by Congress.

The Board's entire discretion relating to the issuance of new certificates for domestic air transportation is found in the

following two subdivisions of Section 401 of the Civil Aeronautics Act (52 Stat. 987, 49 U. S. C. § 481):

> "(d)(1) The Board shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing, and able to perform such transportation properly, and to conform to the provisions of this chapter and the rules, regulations, and requirements of the Board hereunder, and that such transportation is required by the public convenience and necessity; otherwise such application shall be denied.
>
> "(2) In the case of an application for a certificate to engage in temporary air transportation, the Board may issue a certificate authorizing the whole or any part thereof for such limited periods as may be required by the public convenience and necessity, if it finds that the applicant is fit, willing, and able properly to perform such transportation and to conform to the provisions of this chapter and the rules, regulations, and requirements of the Board hereunder."

This statutory language seems to express a plain and unambiguous intent on the part of Congress. It is the unequivocal duty of the Board to issue a certificate of public convenience and necessity if it makes the findings of fact stipulated by Congress. By these two subsections Congress required that the Board "shall" issue a permanent certificate unless it elects, under the permissive second subdivision, to issue a temporary certificate. One certificate or the other the Board is compelled to issue if it makes the appropriate findings.

The Board itself recognizes that Section 401(d) as a whole compels it to issue a certificate once appropriate findings of fact have been made. Thus, in Docket No. 1973, et al.,

Fairbanks-Nome Intermediate Points Case, decided March 31, 1949, the Board said (p. 2, mimeographed advance sheet):

> "Section 401(d) *directs* the Board to issue a certificate authorizing the whole or any part of the transportation covered by an application, if it finds that the applicant is fit, willing, and able to perform such transportation properly, and to conform to the provisions of the Act, and the rules, regulations, and requirements of the Board thereunder, and that such transportation is required by the public convenience and necessity."

This administrative interpretation of Section 401(d) is likewise borne out by statements of the Board's Associate General Counsel, John H. Wanner,* in the course of a symposium conducted by New York University School of Law in connection with the Administrative Procedure Act. In a discussion relating to the difference between the discretionary power vested in the Board under Section 401(h) and the mandatory power conferred by Section 401(d), the following transpired [Federal Administrative Procedure Act and the Administrative Agencies —With Notes and Institute Proceedings (N. Y. Univ. School of Law Institute-Proceedings, Vol. VII) at p. 139]:

> "QUESTION: The general parts of the judicial review section seem to contemplate review in many instances of failure of an agency to act, the term 'agency action' being defined, apparently, to include inaction as well as action. You take this particular function under 401(h) out of that by stressing the discretionary power of the Board, is that right?
>
> "MR. WANNER: That is right, *as distinguished from the provisions under Section 401(d) which require that the Board issue original certificates if the Board finds the statutory standards have been met.*"

*Mr. Wanner has been associated with the Board for over ten years.

Section 401(d) therefore directs the Board to issue the certificates if three conditions have been met: (1) the transportation to be authorized must be the whole or any part of the transportation covered by the application; (2) the Board finds the applicant to be "fit, willing, and able"; and (3) the Board finds the transportation to be required by public convenience and necessity.

There is no dispute in the present case that the applications filed by State cover the transportation authorized (R. 19-26, see also R. 1-18). It is only necessary to glance at the map which is a part of the opinion below (R. 676) to see that the transportation authorized parallels almost in every detail routes applied for by State (App. B, p. XVII, *infra*). The divergencies are too minor to elicit comment.

As to the requirement that the applicant must have been found fit, willing and able, the Board itself has stated that it found State fit, willing and able. Thus, in its opinion on reargument, it said (R. 612):

> "State's ability to build up a qualified organization is not questioned. That it could do so was implicit in the finding that the carrier was fit, willing, and able."

This statement merely recognized the tenor of the Board's original decision, for the entire disposition of the case (R. 565 [901-2]) was based upon the premise that State was fit, willing and able; otherwise, State's application would have been summarily rejected and the Board would not have stated that the choice between State and Piedmont "presents a close and difficult question" (R. 565 [901]).

This conclusion is fortified by the Board's other findings to the effect that State had been operating a charter service since 1941; that, through its President, it had undertaken ex-

tensive research into the problems and requirements of the territory and into the details of feeder operations adapted to the territory; that State had shown an adequate financing program; and that State had shown an energetic interest in the conduct of the operations (R. 565 [901]). Other findings of fact relating to State's detailed plan of operation, the use of approved and tested multi-motored planes, cost estimates and details of its plan for financing (R. 565 [939]) all reinforce the Board's statement upon the reargument that it had found State "fit, willing, and able".

As to the third requirement, namely, the finding of public convenience and necessity for the transportation in question, the Board found (R. 565 [895]):

> "In view of the foregoing consideration, we find that the public convenience and necessity require establishment of a route as follows: Between the alternate terminal points Louisville and Cincinnati via the intermediate points Lexington, Ky., Bristol, Va., and beyond Bristol (a) via the intermediate points Asheville, Charlotte, Southern Pines-Pinehurst-Aberdeen, Fayetteville, and the terminal point Wilmington, N. C., and (b) beyond Bristol via the intermediate points Winston-Salem, Greensboro-High Point, Raleigh-Durham, Goldsboro, and the terminal point, New Bern, N. C."

A similar finding was made as to the Cincinnati to Norfolk route (R. 565 [896]) and the connecting route from Roanoke to Wilmington (*ibid.*).

These findings by the Board exhausted all of the discretion vested in the Board by Congress. There remained only the ministerial duty of issuing the certificate which, upon the basis of the findings made, Congress directed that the Board "shall issue".

The Board has suggested that if it finds two or more applicants all "fit, willing, and able", under the statute, to conduct transportation which has been found required by public convenience and necessity, that then it is entitled to choose the most fit, willing and able applicant to certify. There is nothing in the statute which supports this contention. If we assume, *arguendo*, that the statutory provision requiring the Board to issue a certificate may be construed as the Board contends, nevertheless, upon the present record it was still the ministerial duty of the Board to issue the certificate to State. The Board eliminated all other parties involved in the consolidated proceeding either on the ground that the trunk-line operators should not be certified to operate the local or feeder systems (R. 565 [872-8, 896]) or on the ground that the parties interested in local transportation had not applied for the transportation found necessary or had not met the requirements of the statute in other respects (R. 565 [898-901]). Having thus eliminated the other parties, the Board stated (R. 565 [901]):

> "The choice has thus narrowed down to State Airlines and Piedmont Aviation, and which of these two companies should be selected to conduct the proposed service presents a close and difficult question."

The consideration of Piedmont, not an applicant for the transportation in question, having been pursuant to an error of law, corrected by the decision below, the Board itself has found State to be the only fit, willing and able applicant for the service in question.

Thus, the Board's discretion had been completely exercised when the decision below was rendered no matter what construction of Section 401(d) is adopted. There remains for consideration only the question of whether the court below had the power to compel the Board to do the ministerial act

which Congress directed should be the consequence of the findings made by the Board.

B. The Court Below had Power to Compel the Board to Issue to State the Certificate of Public Convenience and Necessity to which It was Entitled under the Findings Made.

1. The language of the Administrative Procedure Act itself plainly confers power to grant the relief requested.

Under Section 10(e) of the Administrative Procedure Act of 1946,* the court below had not only the power but the duty to compel the Board to issue to State the certificate of public convenience and necessity to which it was entitled under the findings of fact made by the Board. While only the italicized portion of Section 10(e) is directly involved, the entire section is quoted in order to make the discussion of Congressional intent more intelligible:

> "(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. *It shall* (A) *compel agency action unlawfully withheld or unreasonably delayed*; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to

*60 Stat. 243, 5 U. S. C. § 1009(e).

> the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error."

The language of this section seems ample to confer upon the court below the power to compel the Board to issue the certificate of public convenience and necessity which it has unlawfully withheld from State. Not only does the specific power to "compel agency action unlawfully withheld" seem to encompass the present case, but this clause, read in connection with the other powers, indicates the intent of Congress to empower a court to give mandatory relief. Thus, subdivision (B) confers upon the court the power to hold unlawful and set aside agency action, findings and conclusions under the circumstances there enumerated. The court below has held that its power terminated with holding unlawful and setting aside the order certificating Piedmont. Such determination treats subdivision (A) as mere surplusage. But Congress, in enacting subdivision (A) created a power and imposed upon the court a duty to compel affirmative action on the part of the agency from which an appeal had been taken. No more appropriate case for the application of this power can be found than here where the Board, *i.e.*, the agency, has made all findings of fact necessary to the issuance of a certificate to State but has unlawfully withheld the issuance of the certificate to which its findings entitled State.

2. The legislative history of the Act shows a Congressional intent to empower the courts to give the relief here sought.

If, however, the language of Section 10(e) of the Administrative Procedure Act is not deemed on its face plainly to

empower and indeed compel the court below to make the mandate sought by State, then resort must be had to the Congressional history of this law to ascertain the Congressional intent.*

This history** discloses three elements of significance in construing the section here involved:

(1) The Administrative Procedure Act was not a piece of hasty legislation but, on the contrary, was one of the most carefully drafted laws ever enacted.*** The language used was the result of many revisions made in the course of ten years study given to the matter by Congress (See III House Misc. Reports, 79th Cong., 2nd Sess., Rep. No. 1980). Therefore, when Congress required the courts to "compel agency action unlawfully withheld", it may be taken for granted that Congress meant to confer upon the courts the power inherent in the language used.

(2) The enactment of the Administrative Procedure Act stemmed from a dissatisfaction with the unlimited and arbitrary power (often exempt from court review) exercised by administrative agencies (See III House Misc. Reports, 79th Cong., 2nd Sess., Rep. No. 1980, pp. 7-16, and statements by the author of this report, Mr. Walter, Cong. Rcd., Vol. 92, Part 5, pp. 5647-8; see also statements by Judge Summers,

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*The propriety of resort to the Congressional history seems well established. *United States* v. *Mine Workers*, 330 U. S. 258; *Harrison* v. *Northern Trust Co.*, 317 U. S. 476; *United States* v. *Dickerson*, 310 U. S. 554; Powell, *Construction of Written Instruments*, 14 Ind. L. J. 309, 348.

**See the Committee Report (III House Misc. Reports, 79th Cong., 2nd Sess., Rep. No. 1980) and the debates (Cong. Rcd., Vol. 92, Part 2, pp. 2148-2167 and Part 5, pp. 5645-5668).

***See Senator McCarran's statement (Cong. Rcd., Vol. 92, Part 2, pp. 2148-2158) and Mr. Sabbath's statement (Cong. Rcd., Vol. 92, Part 5, p. 5649).

Chairman of the House Judiciary Committee, generally in charge of this bill [*id.*, pp. 5662]). The Administrative Procedure Act was intended to be remedial; it was intended to forestall "abuses which inevitably follow unlimited power" and it implemented the Congressional intent that citizens should be protected against "assaults on their liberty, lives and property" by federal administrative agencies (Cong. Rcd., Vol. 92, Part 5, pp. 5648, 5662). A construction of the act favoring the citizen in his contest with an administrative agency would therefore seem indicated.

(3) It was intended by Congress to afford judicial review as an adequate and complete remedy for every legal wrong. This seems to be the keynote of every comment addressed to the judicial review sections of this act. Thus, the Committee Report emphasized that the 1946 act, differing from its predecessor, contained "comprehensive provisions for judicial review for the redress of any legal wrong"* (III House Misc. Reports, 79th Cong., 2nd Sess., Rep. No. 1980, p. 10). Upon the same subject the report, in summarizing the four principal divisions of the 1946 act, stated:

> "4. It sets forth a simplified statement of judicial review designed to afford *a remedy for every legal wrong* (sec. 10)." (*Id.* at p. 17.)

Dealing specifically with the judicial review section with which we are here concerned, the Committee Report stated (III House Misc. Reports, 79th Cong., 2nd Sess., Rep. No. 1980, p. 41):

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*Substantially the same words were used by Senator McCarran, who was in charge of the Senate Bill (Cong. Rcd., Vol. 92, Part 2, p. 2151).

> "This section *requires adequate, fair, effective, complete,* and just determination of the rights of any person in properly invoked proceedings."*

Statements made both in the House and Senate at the time when the Administrative Procedure Act was finally enacted reflect the same Congressional intent. Thus, Mr. Sabbath, on the floor of the House, when advocating the adoption of a resolution sponsored by his Committee which would permit prompt action on the Administrative Procedure Act, recited the statement in the Committee Report that the act "sets forth a simplified statement of a judicial review designed to afford a remedy for every legal wrong"** (Cong. Rcd., Vol. 92, Part 5, p. 5645).

Mr. Michener, speaking on behalf of the Sabbath resolution, stated the purpose of the Administrative Procedure Act, as follows (*id.*, p. 5646):

> "The only aim and purpose of this bill is to see that the rank and file of American people receive the justice which our system of jurisprudence attempts to guarantee to them."

The Sabbath resolution was adopted and the House, resolving itself into the Committee of the Whole House, pro-

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*Unless Section 10(e) empowers the court below to require the Board to certificate State, the relief accorded is not adequate and fair, it is not effective and it is not complete. A mere remand of this case to the Board may well make the reversal by the Court of Appeals a mere formality affording State no substantive relief.

**Senator McCarran used substantially the same language in the Senate (Cong. Rcd., Vol. 92, Part 2, p. 2151). He also said (*ibid.*):

> "I desire to emphasize the fifth type of provisions, namely, provisions for judicial review, because it is something in which the American public has been and is much concerned, harkening back, if we may, to the Constitution of the United States, which sets up the judicial branch of the Government for the redress of human wrongs and for the enforcement of human rights."

ceeded to a consideration of the Administrative Procedure Act. With respect to the section here involved, Congressman Walter, in charge of the bill, said, in so far as here material (*id.*, p. 5654):

> "Subsection (e) of section 10 requires courts to determine independently all relevant questions of law, including the interpretation of constitutional or statutory provisions and the determination of the meaning or applicability of any agency action. They must compel action unlawfully withheld or unreasonably delayed."*

The House fully understood that Section 10(e) was designed to expand judicial power. Thus, Mr. Gwynne (also a member of the sub-committee in charge of this bill), in specific answer to a question by Mr. Granger whether the purpose of the bill was not merely procedural and not intended to have a substantive effect upon administrative procedure, stated that that was not the case and explained, with respect to the judicial authority conferred by the bill (*id.*, p. 5656):

> "This bill does not give a court review in any case where review is now precluded by statute. It simply clarifies and *expands* in some particulars the authority of the court in reviewing cases in which court review is not precluded by law."

Senator McCarran's answer to a question put by Senator Austin throws considerable light upon the Congressional intent to vest in the courts, upon review, the power to grant affirmative

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*Senator McCarran said (Cong. Rcd., Vol. 92, Part 2, p. 2158):

> "Subsection (e) of section 10 concerns the scope of review. Under this subsection, reviewing courts are required to decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of any agency action. Such courts are required to compel action shown to be unlawfully withheld or unreasonably delayed."

relief. The colloquy was as follows (Cong. Rcd., Vol. 92, Part 2, p. 2159):

> "Mr. AUSTIN. In the event that there is no statutory method now in effect for review of a decision of an agency, does the distinguished author of the bill contemplate that by the language he has chosen he has given the right to the injured party or the complaining party to a review by such extraordinary remedies as injunction, prohibition, quo warranto, and so forth?
>
> "MR. MCCARRAN. My answer is in the affirmative. That is true."

As the Act did not, when adopted by the Senate, and does not now specifically empower a court upon review to issue writs of injunction, prohibition and *quo warranto*, or to invoke other "extraordinary remedies," the right to this type of relief must be found in that part of the Administrative Procedure Act here relied upon, *i.e.*, in the provision that the court shall "compel agency action unlawfully withheld or unreasonably delayed". The narrowest meaning which can be accorded this language is that it requires the courts to compel the agency to act consistently with the findings made in favor of the complaining party. In the present case, this imposes upon the Court of Appeals the duty to compel the Board to issue a certificate of public convenience and necessity to State.

3. The authorities relating to mandamus show that the court below had power to grant the relief requested.

The construction of Section 10(e) of the Administrative Procedure Act here urged would not confer upon the courts any unusual or drastic powers. It has long been recognized that courts might compel administrative agencies to act upon the basis of findings of fact made in favor of the party seeking

court intervention. A recent example of this rule is found in *United States* v. *Hines*, 70 App. D. C. 36, 103 F. 2d 737, 745, in which the court held that mandamus would lie to compel the Administrator of Veterans' Affairs to reinstate an insurance policy with total disability provisions. The Administrator had exercised his discretion in favor of the veteran but had refused to reinstate the disability provisions because the veteran failed to meet the health requirements of a regulation adopted by the Administrator. The court held this regulation void. As in the present case only a mistake of law (corrected by the reviewing court) stood between the relator (veteran) and the desired administrative action. The court, speaking through Chief Justice Vinson (then a justice of the Court of Appeals), said (at p. 44):

> "Thus the Administrator, having fully exercised his discretion in this respect, and having found that the veteran met the standard required by law, there remains no further discretion to be exercised. There only remains a purely ministerial duty of the Administrator which may be compelled to be performed by mandamus."

This decision expresses the general rule long adhered to that a ministerial act can be compelled by the courts either where the statute entrusts no discretion to the administrative officer or agency or where the discretion, which is a condition precedent to the ministerial act, has been exercised. *United States* v. *Schurz*, 102 U. S. (12 Otto) 378; *Roberts, Treasurer* v. *United States*, 176 U. S. 221, 231; *Garfield* v. *Goldsby*, 211 U. S. 249; *Parish* v. *MacVeagh*, 214 U. S. 124; *Lane* v. *Hoglund*, 244 U. S. 174, 181; *Wilbur* v. *Krushnic*, 280 U. S. 306, 318-9; *Miguel* v. *McCarl*, 291 U. S. 442.

The Supreme Court of Indiana, in *Public Service Com.* v. *State, ex rel.*, 184 Ind. 273, 111 N. E. 10, applied the principle here invoked to a factual situation somewhat similar to the present one. In that case the Public Service Commission had, in the exercise of its discretion, found facts entitling the relator to a certificate authorizing the sale of bonds. The Commission had, however, withheld a certificate for a part of the issue on the erroneous legal theory that it was entitled so to do in order to avoid competitive duplication of facilities. This having been held to be an error of law, the court determined that mandamus was a proper remedy to compel the issuance of a certificate. The court said (p. 278):

> "If the facts thus found are such as to entitle the utility to a certificate of authority to issue and sell bonds in a given amount, it is the duty of the commission to issue such a certificate. Under such circumstances the act required is ministerial and not discretionary. *To hold that such act is discretionary would enable the commission, after the facts were determined to grant the certificate of authority or to withhold it at its will, or to grant such a certificate to one public utility and to withhold it from another under the same state of facts. Such is not the purpose of the statute. State, ex rel.* v. *Porter* (1893), 134 Ind. 63, 32 N. E. 1021, 33 N. E. 687. A duty is none the less ministerial because the person who is required to perform it may have to satisfy himself of the existence of a state of facts under which he is given his right or warrant to perform the required duty."

Under the foregoing decisions, it would appear that issuance of a certificate of public convenience and necessity, either permanent or temporary, to State might well have been compelled by mandamus in view of the findings which the Board

had already made. It follows *a fortiori* that under the remedial provisions of Section 10(e) of the Administrative Procedure Act the court below had the power to compel the Board to issue the certificate which it had unlawfully withheld from State.

The decision of this Court in *Federal Comm'n* v. *Broadcasting Co.*, 309 U. S. 134, relied on by the court below to demonstrate its lack of power is not a precedent in the present situation. In that case the Broadcasting Company had applied for a license under the Communications Act of 1934, as amended (47 U. S. C. § 151, *et seq.*). The Federal Communications Commission had denied the application for license upon the grounds (1) that the Broadcasting Company was financially disqualified and (2) that it did not sufficiently represent local interest in the community which the proposed station was to serve. Upon appeal to the Court of Appeals, that tribunal held that the Commission's conclusion regarding the Broadcasting Company's lack of financial qualification was based on an erroneous understanding of Pennsylvania law. The court did not pass upon the second ground stated by the Commission for denying the application because it did not believe this ground to have been controlling. The cause was remanded by the Court of Appeals "for reconsideration in accordance with the views expressed" (309 U. S. p. 139). Following remand, the Commission, which had in the meantime held hearings on two subsequently filed applications for the same facilities covered by the Broadcasting Company's application, directed that the three applications be set down for argument together, to determine on a comparative basis, which in the judgment of the Commission would best serve the public interest. The Broadcasting Company thereupon obtained a writ of mandamus from the Court of Appeals compelling the Com-

mission "to hear and reconsider" the Broadcasting Company's application "on the basis of the record as originally made". On writ of *certiorari* to this Court, the determination of the Court of Appeals in the mandamus proceeding was reversed. It was the opinion of this Court that mandamus would not lie to compel the Commission to change its procedure so as to consider separately the Broadcasting Company's application, for the statute did not require the Commission to apply a principle of priority in disposing of applications and the Commission, accordingly, had authority, if it so desired, to disregard such a principle. This Court's decision was based upon the Congressional intent evidenced by the Communications Act (309 U. S. at pp. 137-8)* and upon the limited power of review which Congress had accorded to the court under that Act (*id.*, at pp. 144-5).

The problem presented in the present case, the facts presented in the present case and the legislation to be construed in the present case are entirely different from *Federal Comm'n* v. *Broadcasting Co.*, *supra*; the differences make that decision inapposite.

Here, the Board has made, in State's favor, all findings of fact necessary to entitle State to a certificate under the statute; in the *Broadcasting Co.* case, the administrative agency had made findings of fact to the effect that the applicant was not a fit party to hold a license under the Communications Act. Here, following reversal, only a ministerial act remains to be

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*This Court found that the purpose behind the Communications Act was strict regulation of the industry by the Commission; but the principal purpose of the Civil Aeronautics Act is the "encouragement and development of an air-transportation system" and "of civil aeronautics" and the "promotion of adequate * * * service"; regulation appears to be a secondary aim (Civil Aeronautics Act § 2; 52 Stat. 980; 49 U. S. C. § 402). A different attitude would seem to be indicated.

done; in the *Broadcasting Co.* case the administrative agency was required to make new findings of fact in the light of the law as construed by the court. To order the issuance of a certificate in the present case only compels the Board to do that which Congress required it to do upon making the findings which have already been made in State's favor; in the *Broadcasting Co.* case, mandamus would have compelled the Commission to adopt a procedure which Congress had not enjoined upon it.*

But if anything in *Federal Comm'n* v. *Broadcasting Co., supra,* should be deemed to militate against the order here requested, then the subsequent enactment of the Administrative Procedure Act would render such decision inapplicable. This is particularly true for this Court in the *Broadcasting Co.* case emphasized the limited power of review conferred upon the court by the Communications Act and concluded that the Court of Appeals in laying bare the error of law which had been committed by the agency and in compelling the agency to act in the light of the court's correction "exhausted the only power which Congress gave it" (309 U. S. 145). This power was limited to entering "a judgment affirming or reversing the decision of the Commission" (47 U. S. C. § 402).

It was such limited power of review which, Congressional history indicates, Congress desired to expand in enacting the Administrative Procedure Act. The power and duty conferred

*The distinctions between the present case and *Federal Comm'n* v. *Broadcasting Co.*, 309 U. S. 134, are equally applicable to *Fly* v. *Heitmeyer*, 309 U. S. 146. There, upon the authority of the *Broadcasting Co.* case, a decision issuing writ of mandamus to the Federal Communications Commission was reversed where that Commission had decided against an applicant on the ground that the applicant was financially disqualified. Upon remand, new findings of fact were required as a condition precedent to the issuance of a certificate and the Commission was held entitled to follow its own procedure in connection with making such findings.

upon the court to "compel agency action unlawfully withheld" cannot be disregarded here.

C. Unless a Mandatory Order is Here Made, the Entire Judicial Review, Here Successfully Invoked, May Be a Meaningless Formality.

The history of State's application before the Board has been a peculiarly unhappy one. Disposition of State's application by the Board was delayed for almost six years*—although Congress enjoined the Board to "dispose of such application as speedily as possible" (Civil Aeronautics Act, § 401(c), 52 Stat. 987; 49 U. S. C. § 481(c)). As a consequence of this delay, State's conception of cross-mountain transportation to connect the southeast with the Ohio Valley-Great Lakes Basin became the basis of routes awarded to others (see footnote 2 p. 4, *supra*) —principally later applicants. Finally, Piedmont received the nucleus of State's proposed system. Without application, without planning for the service involved, without producing evidence as to public need or public expense of the service in question, Piedmont became the recipient of the Board's favor.

State's request for stay, pending court review, was denied by the Board.** Piedmont was thus certificated and made eligible for millions of dollars of mail pay subsidy*** while State was effectively foreclosed from realizing income in its

*From State's original application, in October, 1941 (Tr. 16740), to the Board's ultimate decision awarding to Piedmont the routes for which State had applied on April 4, 1947 (R. 565).

**The Court of Appeals likewise denied State's request for a stay although after State was successful in the Court of Appeals the court granted a stay to Piedmont and the Board pending review in this Court.

***The issuance of a certificate of public convenience and necessity authorizing applicant to carry mail entitles the applicant not only to mail pay but to sufficient mail pay to enable the applicant to carry on its business (Civil Aeronautics Act, § 401(m); § 406(a), (b). Appendix A, pp. V-VI, *infra*).

chosen field of endeavor. Without opportunity to amortize or reimburse itself in any way for the substantial expenditures in research and in preparing and presenting to the Board the evidence upon which the Board acted when it certificated Piedmont, State was further left with the doubtful privilege of expending more substantial sums in order to seek vindication in the courts.

In spite of its almost hopeless position, State sought such vindication and obtained a court decision in its favor. The question now is whether this decision is of substance or will be set at naught when the Board again is called upon to act.

By certifying Piedmont, denying a stay of its operation after State had filed the petition for judicial review (although the Board had taken six years to decide the case), and by granting Piedmont an immediate substantial amount of mail payment subsidies to operate the transportation certified, the Board created a *fait accompli* almost immune to court review. Prior to such certification, Piedmont, like State, was not a certificated airline and Piedmont had carried on only a small passenger transportation charter business (less than State's, *cf.* R. 137 and 289 and see R. 566 [45]). After certification Piedmont was permitted, at the Government's expense, through the collection of mail pay subsidy to create an extensive organization and actually operate the routes in dispute.

Piedmont takes the position that judicial review has been only an unnecessary intellectual exercise, for in motions* filed with the Board since the Court of Appeals' decision it has asked the Board to take "quick action" pending review here to issue Piedmont a new certificate assuring the continuation of Piedmont's operation, irrespective of court decision.

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*Documents filed by Piedmont with the Board on April 8, 1949, and July 11, 1949.

certificate certain conditions with respect to the type of loads to be carried. Congress had authorized the Commission merely to grant the certificate if the applicant were found to have complied with the established standards. This Court sustained the action of the statutory court setting aside an order of the Commission. In so doing, this Court said (315 U. S. at pp. 488-9):

> "To appellee such matters involve life or death.* Empty or partially loaded trucks on return trips may well drive the enterprise to the wall.
>
> * * *
>
> "Congress has made a grant of rights to carriers such as appellee. Congress has prescribed statutory standards pursuant to which those rights are to be determined. *Neither the Court nor the Commission is warranted in departing from those standards because of any doubts which may exist as to the wisdom of following the course which Congress has chosen.*"

In *Davies Warehouse Co.* v. *Bowles*, 321 U. S. 144, the Price Administrator complained that the Congressional exemption of public utilities from his jurisdiction, if applied as Congress intended it to be applied, to warehouses subject to local regulation, would frustrate him in the administration of the Emergency Price Control Act and place upon him wholly unwarranted burdens in determining where his power began and where it ended. This Court, in deciding against the Administrator's endeavor to extend his powers in keeping with his argument, said (pp. 154-5):

> "At least in the absence of a congressional mandate to that effect, we cannot adopt a rule of construction, otherwise unjustified, to relieve federal administrators

*Even more so than in the *Carolina Carriers* case is compliance by the Board with the Congressional mandate a matter of "life or death" for State.

The Board's past attitude and present almost partisan support of Piedmont indicate no desire to yield gracefully to the decision below.* That an administrative agency may upon remand nullify a court decision entirely is well indicated in *Securities Comm'n* v. *Chenery Corp.*, 332 U. S. 194.

If any future contest can be required by the Board between State and Piedmont for the right to the certificate here in question, the difficulty of State's position needs no elaboration. But for the original order of the Board erroneously placing Piedmont in the certificated carriers' business, State would welcome such a contest. Now, however, Piedmont, under its unlawful certificate, will have operated the transportation in question for some two or more years at the time of the ultimate remand of this case. Vast funds, including most substantial mail payment subsidies,** have been made available to Piedmont by reason of its certification. It has expended these funds in entrenching itself and strengthening its position as an airline operator. It has become an established licensee.

Technically accurate is the suggestion that the Board will act fairly and that action in disobedience to the court's opinion

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*Note, for example, in *Service to Newport News, Va. Case*, Docket No. 3238, et al., decided September 15, 1949 (mim. opinion), the Board, over State's objection, extended Piedmont's certificate in the face of the decision below holding the Piedmont certificate illegal. In so doing, the Board treated the decision below as completely nonexistent and assumed that Piedmont would continue its operations in spite of the court action. Thus, the Board said (mim. opinion, pp. 2-3):

> "Furthermore, the temporary certification of Piedmont to serve Newport News in this proceeding will enable us to observe the results of operations at that point over a period of approximately one year before our determination of the question whether Piedmont's certificate, which will expire in December 1950, shall be renewed."

**Public Records of the Board show that through August 31, 1949 Piedmont has received $1,720,536.55 of mail pay subsidy under the certificate which should never have been granted to it in the first place.

> of what we may well believe is a substantial burden but one implied by the terms of the legislation when viewed against the background of our form of government."

So, here, Congress did not see fit (even if it could have done so) to delegate to the Civil Aeronautics Board the broad power to certificate any person for any route system which the Board might feel required by public convenience and necessity, irrespective of the scope of the application filed by such person. If the Board, in establishing an adequate system of airlines, feels handicapped by the failure to have such power, it may not free itself of this handicap by a disregard of the law.

(a) The Civil Aeronautics Act, as construed by the court below, does not place the Board in a procedural straitjacket.

The fact, moreover, is that the frustration which the Board feels is largely imaginary.

If the Board decides that public convenience and necessity require routes for which there is no applicant "fit, willing, and able", the Board need only deny the applications before it. If the service is, in fact, necessary, there will be ample opportunity in a subsequent proceeding where applications have been filed covering the points in question to issue the required certificates. Indeed, that is the solution which the Board has adopted in other cases. See, for example, *Pennsylvania-Cent. Air., Youngstown-Erie-Buffalo Op.*, 1 C. A. A. 811, 818;*

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*Application to serve Youngstown denied because, while service needed, the applications did not cover the service found necessary (see comments on the *Pennsylvania Central Airline* case in 1d Air L. R. 405, 408). Subsequently, Pennsylvania Central Airlines, as well as United, filed applications for the east-west service to Youngstown found desirable by the Authority and certificates were issued (*United A. L., et al., Youngstown, Ohio, Operation*, 2 C. A. B. 543, 552-3).

will not be assumed. This Court has, however, in a similar situation, realized that weight must be given to practicalities rather than legal theory. Thus, in sustaining the complaining applicant in *Ashbacker Radio Co.* v. *F. C. C.*, 326 U. S. 327, 332, it was said:

> "Legal theory is one thing. But the practicalities are different. For we are told how difficult it is for a newcomer to make the comparative showing necessary to displace an established licensee.",

State does not, of course, concede that the Board is entitled to place it in the unfair position above outlined. As the Board blandly suggested in its application for stay in the court below, "Whatever erroneous determination the Board might make in favor of or adverse to that [State's] position is subject to correction by this court" (Application for Stay, dated May 2, 1949). That, however, affords little consolation to State which may reach a condition of exhaustion before it receives anything from its long struggle under an act enacted for "the encouragement and development of civil aeronautics".* The "adequate, fair, effective, complete, and just determination"** of State's rights requires a mandatory order compelling the Board to take the ministerial action to which its findings of fact, already made, plainly entitle State under the Civil Aeronautics Act. Any other decision renders meaningless in situations such as the present one the Congressional mandate to the courts that they shall "compel agency action unlawfully withheld".

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*Civil Aeronautics Act, § 2(a), (f), 52 Stat. 980, 49 U. S. C. § 402(a), (f).

**Congressional Record, p. 32, *supra*.

In Nos. 157 and 159

POINT II

THE COURT OF APPEALS WAS CORRECT IN DETERMINING THAT THE BOARD HAD NO STATUTORY AUTHORITY FOR ISSUING THE CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY TO PIEDMONT WHICH HAD NOT APPLIED FOR THE TRANSPORTATION COVERED BY THE CERTIFICATION.

A. The Court Below Had the Power to Review the Board Orders.

The Court of Appeals was unquestionably authorized to interpret the Civil Aeronautics Act and determine whether the Board, in certifying Piedmont, had acted in compliance with the statutory requirements. Both the Civil Aeronautics Act (§ 1006, App. A, p. VI, *infra*) and the Administrative Procedure Act (§ 10(e), App. A, p. X, *infra*) so provide.

The latter specifically invests the reviewing court with the power and duty to "decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action". Power to "hold unlawful and set aside agency action, findings, and conclusions" is bestowed if the reviewing court finds, as did the court below, that the agency action is arbitrary and capricious, not in accordance with law, in excess of statutory authority or unsupported by substantial evidence.*

In *C. & S. Airlines v. Waterman Corp.*, 333 U. S. 103, this Court observed that orders of the Civil Aeronautics Board

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*Other grounds are also listed in the statute (App. A, p. X, *infra*) but the foregoing seem adequate to support the decision; athough we also show below (pp. 62-5, *infra*) that the certification of Piedmont was "without observance of procedure required by law".

relating to the issuance of certificates of public convenience and necessity "which do not require Presidential approval are subject to judicial review to assure application of the standards Congress has laid down" (p. 109).

The orders reviewed and reversed herein by the Court of Appeals were such orders and the court's decision was that Congressional standards had not been applied by the Board in certifying Piedmont. The Court of Appeals, *inter alia*, was of the opinion that "any award by the Board in such circumstances [*i.e.*, to one who was not an applicant for the transportation certificated] is one made without sanction of Congress and in excess of its delegated powers" (R. 683).

The only questions here presented, therefore, are whether the court below correctly construed the legislative mandate and correctly held that the Board, in certifying Piedmont, acted contrary to the standards established by Congress.

B. The Legislative Mandate Embodied in the Civil Aeronautics Act is Unambiguous and was Violated in Issuing the Certificate to Piedmont.

Section 401 of the Civil Aeronautics Act* contains the grant of power to the Board enabling it to certify new route applicants and also embodies the criteria which Congress established for the exercise of the Board's power.

This section, after prohibiting air transportation without a certificate, provides:

> First, applications for a certificate "shall be made in writing * * * and shall be so verified, shall be in such form and contain such information" as the Board shall, by regulation, require [Section 401(b)].

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*52 Stat. 987, 49 U. S. C. § 481, App. A, pp. II-V, *infra*.

Second, each application "shall be accompanied by such proof of service upon such interested persons, as the Board shall by regulation require" and upon the filing of an application the Board shall give notice thereof "to the public * * * and to such other persons as the Board may by regulation determine" [Section 401(b), (c)].

Third, interested persons shall be entitled to file with the Board documents of opposition or support with respect to the application [Section 401(c)].

Fourth, the Board shall set the application for public hearing and "shall dispose of such application as speedily as possible" [Section 401(c)].

Fifth, the following standards shall be applied in disposing of the application [Section 401]:

> "(d)(1) The Board shall issue a certificate authorizing *the whole or any part of the transportation covered by the application*, if it finds that the applicant is fit, willing, and able to perform *such* transportation properly, and to conform to the provisions of this chapter and the rules, regulations, and requirements of the Board hereunder, and that *such* transportation is required by the public convenience and necessity; otherwise such application shall be denied.
>
> "(2) In the case of an application for a certificate to engage in temporary air transportation, the Board may issue a certificate authorizing *the whole or any part thereof* for such limited periods as may be required by the public convenience and necessity, if it finds that the applicant is fit, willing, and able properly to perform *such* transportation and to conform to the provisions of this chapter and the rules, regulations, and requirements of the Board hereunder."

Sixth, each certificate issued "shall specify the terminal points and intermediate points, if any, between which the air carrier is authorized to engage in air transportation and the service to be rendered" [Section 401(f)].

To carry out the foregoing Congressional mandate and make the regulations contemplated thereby, the Board enacted Economic Regulations governing applications for certificates of public convenience and necessity.* These (1) provide for the execution of applications with due formality, including verification; (2) require the identification of each route for which a certificate is sought "specifying the type or types of service (mail, passengers, and property) to be rendered on each such route", and naming "every terminal and intermediate point to be included in the certificate for which application is made"; and (3) require the inclusion of a map "showing all terminal and intermediate points to be served, giving the approximate mileage between all adjacent points, and the principal over-all distances".

The statutory provision (Section 401) seems too plain to require much interpretation or construction. The only power conferred upon the Board is to authorize "the whole or any part of the transportation covered by the application". There is no other power.

The regulations of the Board requiring, in equally plain and unambiguous terms, made emphatic by repetition, that the applications must specify every terminal and intermediate point to be included in the certificate for which application is made, demonstrate the Board's own recognition that it may not issue a certificate except upon the basis of an explicit application for the transportation to be certified.

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*These regulations are reprinted at pp. XIII-XV of App. A, *infra*, and are found in Fed. Reg. Vol. 8, No. 177, at pp. 12257-8.

Indeed, any other construction of Section 401 would do violence to the entire statutory scheme. If certificates could be issued at large, irrespective of the routes covered by the application, the provisions for notice, service upon interested parties and the right to oppose would be wholly meaningless formalities, for no one could ever ascertain what issues were raised by any application filed.

Measuring the certification of Piedmont against the statutory standards can leave no doubt that the certification by the Board was in utter disregard thereof.

Pursuant to the statute, and the regulations of the Board above referred to, Piedmont, on March 8, 1945, filed its amended application specifying the precise terminal and intermediate points with respect to which it sought a certificate for passenger, mail and property transportation (R. 69-70). This application specified only the points ascribed to Piedmont in Map No. 1, incorporated in the opinion of the court below (R. 676; App. B, p. XVI, *infra*).

Aside from some local service principally in North and South Carolina, Piedmont designated in its application points lying on a roughly northerly and southerly axis from Columbia, S. C., through Charlotte, N. C., Winston-Salem, N. C., and Roanoke, Va., to Hagerstown, Md., and Washington, D. C., with a branch in a northeasterly direction to Norfolk, Va. (R. 69-70, 676). Piedmont specifically intended the principal axis of its route to run from southern points in a northeasterly direction toward the large industrial centers there found (R. 418). Not a single point specified in this mail and passenger application was west of the Appalachian Mountains (R. 69-70). The transportation was intended to be confined by those mountains to the area lying east thereof and follow existing surface transportation facilities (R. 416-7, 489).

The transportation covered by the certificate, on the other hand, ran predominantly in an easterly and westerly direction and was intended specifically to connect the Piedmont and Coastal regions east of the Appalachian Mountains with industrial centers in the Ohio Valley region west thereof (R. 565 [892-6]; R. 626-7; see map, R. 676, and App. B, *infra*). Far from regarding the Appalachian Mountains a barrier, as Piedmont had by virtue of the nature of its application (R. 416-7; 552-3), the Board specifically intended to certificate transportation, following State's plan (R. 115, 120; R. 213-20, 234, 245; R. 676), across the Appalachian Mountains at their highest and widest point (R. 565 [867, 892-3]).

Piedmont's amended application failed, even in the most general terms, to apply for "the establishment of a route designating Louisville and Cincinnati as alternate terminals and extending into the Piedmont area" to "provide these Carolina cities with an outlet to Louisville and Cincinnati" (R. 565 [895]). But these are the very routes which the Board found were required by public convenience and necessity and embodied in the certificate issued to Piedmont (*ibid*; R. 626).

The fundamental difference between the transportation covered by Piedmont's application and that certificated is also apparent statistically for, of the thirty-nine points covered by Piedmont's application, only nine were covered by the certificate issued to it and, conversely, of the twenty-eight points covered by the transportation certificated only nine points were also included in Piedmont's application (R. 69-70; 626-7). Furthermore, a glance at the maps (R. 676) will indicate that the type of service contemplated by Piedmont, even to the nine common points, had in most instances no relation whatever to the type of service certificated. Thus, for example, Piedmont's application expressed only the intent to serve Winston-Salem

as a terminal on routes leading north to Washington, D. C., and south to Columbia, S. C. (R. 69-70), but the Board certificated Winston-Salem as a point on an east-west route leading from Louisville, Ky., and Cincinnati, Ohio to New Bern, N. C. (R. 626).

There can be no question that the transportation certificated to Piedmont bears not the slightest resemblance to the transportation covered by Piedmont's application. There is no question here of whether the Board, under the statute, may have power to certificate intermediate points along routes described in applications but not specifically named therein, nor is there any question here as to the Board's power to certificate closely adjacent points on routes specified. That the Board may have such power was indeed assumed by the court below (R. 681).

The certification here was in direct defiance of the limitation placed upon the Board's power by the Congressional mandate which limited the power to certify to the "whole or any part of the transportation covered by the application" (§ 401[d] Civil Aeronautics Act).

To avoid the inescapable conclusion reached by the court below that there was no legislative authority for issuing the certificate here issued to Piedmont; the Board and Piedmont have urged (1) that an introductory clause and a concluding clause in the Piedmont application permitted the Board to act without regard to the points specified in Piedmont's application; and (2) that a limitation of the Board's power, as Congress plainly limited it, to certifying transportation only if covered by an application should be disregarded for the limitation would place the Board in a "procedural straitjacket".

An examination of these contentions will show that they have no basis in fact or law.

1. The contention that the "modification" clause, or general prayer for relief, extended Piedmont's application to cover the transportation certificated is unsupportable.

The introductory paragraph of Piedmont's application, as amended, has been the Board's and Piedmont's principal reliance; in so far as here material, it reads (R. 63):

> "The Applicant * * * hereby applies for a * * * Certificate of Public Convenience and Necessity under Section 401 of the Civil Aeronautics Act * * * for the authorization to engage in scheduled air transportation * * * *on the routes detailed herein*, or such modification of *such routes* as the Board may find public convenience and necessity require."

This introduction is followed by the heading "AUTHORITY SOUGHT" (R. 64). Aside from the request, here immaterial, for authority to transport by the pick-up method* (R. 64-7), the application contains only a request for a certificate "authorizing the scheduled transportation by air of passengers, mail, express and property over each of the following routes" (R. 69). The routes then enumerated are solely the routes east of the Appalachian Mountains, above described.

The only other clause relied upon is a clause contained in the prayer for relief in the original application, though not in the amendment, which uses the stock language that applicant prays "for such other and further relief, general and specific, under Section 401 * * * as the Board may deem appropriate, and to which applicant may be entitled * * *" (R. 41).

If the general relief clause is deemed sufficient to transform an application for routes east of the mountains between Washington, Norfolk and Columbia, S. C., into an application of

*The proposed messenger service (R. 67-9) in connection with the pick-up service likewise is of no importance here.

east-west routes from Louisville and Cincinnati, across the mountains to Wilmington, New Bern and Norfolk, then the requirement that an application must specify all terminal and intermediate points to be served is completely meaningless and the Congressional limitation upon the Board's power must be entirely disregarded.

Such a construction has not been seriously urged.

Turning then to the "modification" clause upon which entire reliance was placed in the court below, it seems equally clear that the introductory language is insufficient to turn Piedmont's application into one covering the transportation actually certificated. All that this clause accomplishes is to request a "modification" of "such routes", *i.e.*, "the routes detailed herein" (R. 63). Without reliance upon any complicated definitions, common sense seems to indicate that such a clause is insufficient to imply a complete transformation of the application so as to bring within its scope transportation entirely different from that detailed in the application. It seems on its face insufficient to create equivalence between Piedmont's application for service in and from North and South Carolina to Washington and Norfolk and a certification designed to connect cities in Kentucky and Ohio with eastern cities across the mountains.

But if there is any question as to the meaning of the word "modification" in this connection, dictionary definitions demonstrate that it is not a catalyst capable of transforming the routes covered by Piedmont's application into those embodied in the certification. Webster defines "modification" as the "act of modifying, or state of being modified" and the verb "modify" in turn, in the only sense in which it could possibly be used here, is defined as follows:

"1. to limit; also to mitigate; assuage [obs.]

"2. to reduce in extent or degree; to moderate; qualify; lower; * * *

"4. to change somewhat the form or quality of; to alter somewhat; as to modify the terms of a contract" (Webster's New International Dictionary, Second Edition, 1943).

The Oxford English Dictionary (Ox. 1933) gives the following general definitions of "modification":

"1. The action of limiting, qualifying or 'toning down' (a statement, etc.); a limitation, restriction or qualification."

"3. The action in making changes in an object without altering its essential nature or character; the state of being thus changed; partial alteration."

Indeed, Piedmont itself, through the testimony of its President, Thomas H. Davis, ascribed to the "modification" clause as well as the general relief clause the very meaning for which we contend. When being cross-examined relative to the possibility of giving service to the Greensboro-High Point Airport, located adjacent to one of the routes applied for by Piedmont, in addition to giving service to the Winston-Salem Airport located some fifteen miles from the Greensboro Airport, Mr. Davis said (R. 470):

". . . I would like to have it understood here, now, that any point not included on our proposed routes *which are along our proposed routes*, and which *would not materially upset our plan of operation*, that the Civil Aeronautics Board saw fit for us to serve, we would be delighted to serve it."

That is the only direct statement in the entire record of Piedmont's construction of its own application and plainly shows that Piedmont never intended to have included within its application points and routes wholly at variance with the specific transportation applied for.

Any construction of the modification clause or the general relief clause, to permit the certification of transportation entirely different from that covered by the specific application, disregards the Board's own regulation* which requires an application under Section 401 of the Civil Aeronautics Act to identify each route "for which a certificate is desired", specifying the name of "every terminal and intermediate point to be included in the certificate for which application is made". Under that regulation an application merely stating that it is for any points which the Board may see fit to certify is obviously improper and inadequate. But such would be the Piedmont application if the modification clause is to be given the effect for which the Board and Piedmont argue.

With the exception of the present case, the Civil Aeronautics Board has consistently, in its opinions dealing with similar problems, taken the position that a certificate may not be issued unless the application specifies the transportation which the Board ultimately determines to be needed by the public. See *West Coast Case*, 6 C. A. B. 961, 997; *Colonial Air. et al., Atlantic Seaboard Op.*, 4 C. A. B. 552, 558-9; *New England Case*, 7 C. A. B. 27, 39;** *North Central Case*, 7

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*Board's Economic Regulations § 238.1, App. A, p. XV, *infra*.

**The applications of Norseman and Northern were summarily rejected because the applications covered routes principally in a north and south direction, whereas, the Board found that feeder lines in an easterly and westerly direction were primarily required. Both applications contained general relief clauses and the Norseman application contained a "catch-all" requesting such routes "in the New England area as the Board may deem to be in accord with the public interest * * *."

C. A. B. 639, 673-4; *Middle Atlantic Area Case*, 9 C. A. B. 131, 177;* see other cases cited pp. 65-6, *infra*.

In denying the application of Los Angeles Airways, the Board in the *West Coast Case*, 6 C. A. B. at p. 997, *supra*, announced the very principle for which we contend:

> "Although its application contained a clause to the effect that it would accept a certificate authorizing service which might be found by the Board to be required by the public convenience and necessity in the area of its routes or adjacent to its routes, we do not believe that it is sufficiently broad to justify the selection of this carrier to provide the service here found required."

In the *Panagra Terminal Investigation*, 4 C. A. B. 670, the Board decided that a statutory provision** empowering it to "alter", "amend" and "modify" an outstanding certificate of public convenience and necessity did not permit the Board to extend Panagra's route by mileage amounting to 14% of Panagra's then existing mileage (see pp. 673 and 678). The power to "alter", "amend" and "modify" was held by the Board not to confer authority to "include the addition of new service which would be so extensive as to amount to a new air transportation route, or of *such a kind as to substantially change the character of a carrier's system*" (*id.* at p. 673).*** This lan-

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*Atlantic Central's application was summarily rejected because it did not specifically cover the route pattern found necessary by the Board although that Company's amended application contained a "catch-all" clause stating that its application was not limited to specific routes but should be construed to apply to "any other route or routes * * * to conform to its [the Board's] judgment as to the requirements of the public convenience and necessity * * *."

**Section 401(h) Civil Aeronautics Act, App. A, p. V, *infra*.

***The reversal of this case in *W. R. Grace & Co.* v. *Civil Aeronautics Board*, 154 F. 2d 271, did not disturb this decision but merely instructed the Board to determine whether it did not in fact have an application before it filed by Panagra for the service in question so that the Board would not be limited to acting on its own initiative under Section 401(h).

guage is apposite here, where the Board, relying solely on the much weaker phrase "such modification of such routes" has granted a certificate changing not only substantially, but entirely and completely, the character of the system applied for by Piedmont.

The Board's decision here was contrary to the opinion of the Attorney General (39 Op. Atty. Gen. 442, 444), who held, basing his opinion on the requirement of a posted notice of the application, that the Civil Aeronautics Authority was without power under the Grandfather clause contained in the Civil Aeronautics Act, Section 401(e)*, to issue a certificate covering more routes than had been applied for by the original telegraphic application filed by the applicant.

Even if it be assumed, therefore, that the very limited clause in the Piedmont application is a "catch-all" clause,** the Board's decisions referred to above and in another subdivision (pp. 65-6, *infra*), indicate that the Board has never before utilized such a clause to change entirely the scope of applications.***

Indeed, the examiners in the present case, in defining the proper use which might be made of catch-all clauses, expressly

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*52 Stat. 987, 49 U. S. C. § 481(e), App. A, p. III, *infra*.

**Real catch-all clauses are much more all-embrasive and generally include language to the effect that applicant requests authority to serve any other points in the general area involved by the application (R. 665-70). Even such language, of course, would be of no assistance to Piedmont which did not include within the scope of its application most of the area covered by the transportation certificated.

***The chaos which would follow acceptance of the Board's present argument is illustrated in this very case in which there were 25 airline applicants. If each applicant had regarded each other applicant as a prospective contestant for routes sought, the hearing would undoubtedly still be in its early stages. But that is what the Board's decision here would seem to require, for most applications, in addition to specifying routes, contained a "catch-all" or general relief clause in most instances much broader in scope and purpose than that found in the Piedmont application (R. 665-70).

ruled that "no evidence will be received with respect to cities or routes which are not specifically set forth in the application" (R. 671). If the Board's present contentions as to the efficacy of the Piedmont "modification" clause are to be accepted, then it follows that the examiners were authorized to recommend and the Board authorized to certify routes with respect to which the examiners had specifically excluded all evidence. Such a result is preposterous. The obvious purpose of "catch-all" clauses is to permit the Board, as the examiners (R. 671) and the court below (R. 681) suggested, to deal with intermediate and closely adjacent points which are in fact covered by an application although, perhaps, not specifically named therein.

2. The Congressional standards must be applied, irrespective of the Board's contention that it desires a broader scope for its activities.

The Board's argument is that if its power to certify is limited, as the Act states on its face, to transportation "covered by the application" of any one applicant, then it may not be able to certify the type and pattern of route systems which it may find desirable in the public interest. The first answer to this argument is that Congress and not the Board establishes the standards which the Board must apply in issuing certificates. A mere feeling on the part of the Board that it would like broader powers and that the limitations imposed by Congress are onerous, is wholly insufficient to deprive the Congressional standards of finality.

The Interstate Commerce Commission made a very similar argument in *U. S. v. Carolina Carriers Corp.*, 315 U. S. 475. The Commission there believed that it was furthering the general objects of the Motor Carrier Act of 1935 (49 Stat. 543) by imposing upon an applicant for a "Grandfather clause"

Trans-Southern Air., et al., Amarillo-Oklahoma City Op., 2 C. A. B. 250, 268-9; *Delta Air, et al., Service to Atlanta and Birmingham*, 2 C. A. B. 447, 478; *Cincinnati-New York Additional Service*, 8 C. A. B. 603, 605; *Great Lakes Area Case*, 8 C. A. B. 360, 399.

Furthermore, Congress specifically vested in the Board, upon its own initiative "after notice and hearing", the power to "alter, amend, modify, or suspend any such [existing] certificate, in whole or in part", upon certain specified conditions.* Thus, the Board, with a minimum of effort, but after notice of its intent and hearing (both of which were entirely lacking here), may establish the type of airline pattern which it desires.**

It is particularly significant that the power given to the Board with respect to new applications does not include the right to alter, amend or modify the applications filed. The power to issue new route certificates is strictly limited to granting certificates with respect to the whole or any part of the transportation in fact applied for. In fairness to the applicants, those opposing the application, and the Government, itself, including the Post Office Department, which is required to foot the bill for certificated carriers, it is submitted that the Congressional limitation is eminently proper.

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*Civil Aeronautics Act of 1938, § 401(h), 52 Stat. 987, 49 U. S. C. § 481(h) (App. A, p. V, *infra*).

**The Board did exactly this in *Arizona-New Mexico Case*, 9 C. A. B. 85, 100, saying: "No application by that carrier is now before us in these proceedings and service by it is not presently at issue. However, we will enter an order instituting a proceeding, under section 401(h) of the Act to determine whether the public convenience and necessity require the amendment of Continental's certificate * * *." The Board took the same action in *Delta Air, et al., Service to Atlanta and Birmingham*, 2 C. A. B. 447, 478.

(b) The decisions relied upon by respondents do not support their position.

The decisions to which the Board and Piedmont have referred in an endeavor to sustain their interpretation of the law are entirely inapposite. Cases such as *Chicago, St. P., M. & O. Ry. Co.* v. *U. S.*, 322 U. S. 1; *Alton R. Co.* v. *United States*, 315 U. S. 15, and *McCracken* v. *United States*, D. C. Ore., 47 F. Supp. 444, relate to different statutes and different questions. With the exception of a part of the *Omaha Ry.* case, 322 U. S. 1, *supra*, they are concerned entirely with certificates of public convenience and necessity under the Grandfather clause of the amended Motor Carrier Act (49 U. S. C. § 306). Under that clause the Interstate Commerce Commission was required merely to resolve the question of whether the applicant "was in bona fide operation on June 1, 1935, over the route or routes or within the territory for which application is made". This language differs materially from the limitation imposed by the Act involved in the present controversy. In each of the cases, except one portion of the *Omaha Railway* case, the application filed under the Grandfather clause included the points covered by the certificate and the only question was whether the applicant was in fact serving, before June 1, 1935, the route or territory covered by his application.

That portion of the *Omaha Railway* case, 322 U. S. 1, which did not involve a Grandfather clause determination upheld the order of the Interstate Commerce Commission requiring applicant to serve certain *intermediate* points upon routes which had been specifically applied for but which points applicant, by amendments of its application, had indicated it did not wish to serve. Even if we assume, as did the court below (R. 681), that similar power can be ascribed to the Civil

Aeronautics Board,* such power has no relation whatever to the power which that Board sought to exercise in the present proceeding. It is one thing, particularly in the absence of competing applicants**, to authorize service to intermediate points on routes specifically covered by an application; it is another to certify entirely new routes not covered by the application at all.

C. The Error of the Board is Emphasized by the Provisions Requiring Notice to All Interested Parties and Proper Hearings as a Condition to Issuing Certificates; Failure to Notify State of Piedmont's Unexpressed Aspirations Deprived State of a Hearing in Keeping with Standards of Due Process of Law.

Section 401(b) and (c) of the Civil Aeronautics Act integrate with the requirement of the filing of an application the service thereof upon "interested persons" and the command that the Board "shall give due notice thereof to the public * * * and to such other persons as the Board may by regulation determine". (App. A, p. II, *infra*).

Section 5 of the Administrative Procedure Act (60 Stat. 239, 5 U. S. C. § 1004) provides that in every case where, after hearing, the administrative agency is required to determine a matter, there shall be notice of hearings and issues and

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*It should be noted that the statutory provision of the Motor Carrier Act, 1935 (49 U. S. C. § 308[a]), upon which the court relied in the *Omaha Railway* case (322 U. S. p. 4), included a phrase omitted from a somewhat similar provision in the Civil Aeronautics Act (§ 401[f]), *viz.*, the right to attach to a certificate terms "including terms, conditions, and limitations as to the *extension* of the route or routes of the carrier".

**The parties complaining about the decision in the *Omaha Railway* case, *supra*, were railroads which were themselves serving the points in question—they were simply endeavoring to suppress competition.

all persons entitled to such notice shall be advised of "the matters of fact and law asserted" (App. A, p. VIII, *infra*).*

The Board in its own regulations issued at the same time as the regulation requiring the filing of detailed applications specifying each point to be served provided that notice of applications should be given to the public and to "all of the existing air carriers and other applicants" (App. A, p. XI, *infra*).

If under the statute and the regulations the notice is to serve any purpose whatever, it must obviously be a notice referring to an application which, at least in substance, plainly specifies the nature of the routes for which application is made. The notice effected by Piedmont's amended application indicated to all interested parties, including Public Counsel and State, that Piedmont sought only certain limited passenger routes principally in a northerly and southerly direction in the Piedmont and Coastal Regions of Virginia and the Carolinas. Certainly, no notice was given to anyone that Piedmont sought the trans-Appalachian Ohio Valley routes in which State was interested.

State's perfunctory cross-examination of Piedmont, which made no effort to show any factors bearing upon Piedmont's inability to operate trans-Appalachian routes, State's failure to attack the competency of Piedmont's personnel for trans-Appalachian operations, State's failure to attack specifically the lack of any plan for the operation of trans-Appalachian routes, and State's failure to attack Piedmont's plans for day contact flight, are all matters which may be ascribed directly to the failure of the Piedmont application to indicate any interest in the trans-Appalachian routes sought by State.

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*While this Act became effective after the original hearings, it was the law before the Board took the action which was reversed by the Court of Appeals.

The type of evidence which State could have adduced is exemplified in the statement of Carl J. Brock (R. 629 [78-81]), which gives an indication of Piedmont's shortcomings in connection with any operation such as that proposed by State and certified by the Board.

The failure of Piedmont in its exceptions to the examiners' report to except to the award of the trans-Appalachian Ohio Valley routes to State, and the failure to except to the examiners' report insofar as it did not award such routes to Piedmont, constitute the final formal recognition by Piedmont that it was not the applicant for such routes (R. 533-4).

Nowhere in the entire record of hearings and arguments before the examiners or, indeed, the Board, prior to the original decision by the Board in this case, did Piedmont evince any interest whatever in the trans-Appalachian Ohio Valley routes awarded to it, although applied for only by State.

Under these circumstances, to deny a certificate to State which was found fit, willing and able to operate these routes and to issue the certificate to Piedmont was not only contrary to the statutory and regulatory requirements of notice but was directly at variance with the decision of this Court in *Morgan* v. *United States*, 304 U. S. 1. Much of the opinion is apposite. We quote briefly (pp. 18-9, 22):

> "The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one. Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command.
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> * * *

> "For, as we said at the outset, if these multiplying agencies deemed to be necessary in our complex society are to serve the purposes for which they are created and endowed with vast powers, they must accredit themselves by acting in accordance with the cherished judicial tradition embodying the basic concepts of fair play."

The Board itself has recognized that it should not act unless it has "given due and timely notice to the applicant that this matter was in issue and after hearing thereon" (*Florida Case*, 9 C. A. B. 444, 445; see also cases cited in next sub-point). But this principal was wholly disregarded in the certification of Piedmont.

D. The Civil Aeronautics Board has Repeatedly Construed the Civil Aeronautics Act to Forbid the Issuance of Certificates for Routes not Covered by Applications Filed.

The expressed and published opinions of the Board prior to the present case are wholly at variance with its position here. In a consistent line of decisions, the Board has always adhered to the obvious meaning of the statute, *viz.*, that certificates may not be issued to applicants who have not filed applications specifically covering substantially the routes found to be necessary. *Trans-Southern Air., et al., Amarillo-Oklahoma City Op.*, 2 C. A. B. 250, 268-9*; *Delta Air, et al., Service to Atlanta and Birmingham*, 2 C. A. B. 447, 478; *Colonial Air. et al., Atlantic Seaboard Op.*, 4 C. A. B. 552, 559; *Rocky Mountain*

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*The applications of Braniff and Trans-Southern were denied because they did not contain specific requests to serve Tulsa and Little Rock "and other air carriers did not have notice at the time of the hearing of the request to authorize service to" the points in question (2 C. A. B. at pp. 268-9). The Braniff application contained the broad "catch-all" clause requesting "such other and further authority as the circumstances may warrant".

States Air Service, 6 C. A. B. 695, 734;* *West Coast Case*, 6 C. A. B. 961, 997, *supra*; *New England Case*, 7 C. A. B. 27, 39, *supra*; *North Central Case*, 7 C. A. B. 639, 673-4; *Great Lakes Area Case*, 8 C. A. B. 360, 398, 399;** *Cincinnati-New York Additional Service*, 8 C. A. B. 603, 605; *Mississippi Valley Case*, 8 C. A. B. 726, 751, 763; *Arizona-New Mexico Case*, 9 C. A. B. 85, 94;*** *Middle Atlantic Area Case*, 9 C. A. B. 131, 177.

The Board's construction of the Civil Aeronautics Act prior to the present decision is exemplified in the *Colonial Air. et al., Atlantic Seaboard Op.* case, *supra*. There the Board refused to issue to Colonial a certificate for New York-Florida service where its application had covered service from New York to Charleston, S. C., and thence to Nassau. It will be noted that the divergence between the application and what was ultimately sought was much less than the tremendous divergence

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*Four of six applicants eliminated because they did not, in addition to certain long distance service, propose a local service which the Board found necessary. At least one of the rejected companies (Inland) had a "catch-all" clause requesting "such other and additional authority as may be deemed appropriate".

**The applications of Trans-Ohio and Michigan Central were rejected largely because neither application covered all of the routes found necessary in spite of the fact that the application of each contained a clause requesting such other and further relief as public convenience and necessity or the Board might require and the Trans-Ohio application specifically requested routes to "such other and additional cities and such other alternate route patterns in the region involved as the Board may deem proper".

***The application of Air Transit Company was denied because its application was limited to New Mexico, whereas service into Arizona was found necessary by the Board. But the Air Transit application contained the very language which the Board in the present case has found sufficient to support the issuance of a certificate covering routes entirely different from those applied for by Piedmont and into two states not even mentioned in its application, for Air Transit requested "such modification of such routes as the Board may find public convenience and necessity require".

between Piedmont's passenger application and the certificate issued, but the Board said (4 C. A. B. at p. 559):

> "We must interpret Colonial's application in the light of the requirement of 'fair hearing' required by the statute and the Constitution. There are before us applications contemplating the type of service between New York and Florida points which we have found required by the public convenience and necessity, which are supported by competent and substantial evidence in this record. To award a certificate to Colonial authorizing service between New York and Florida points on the basis of the record before us would constitute a denial of that due process which is contemplated by the provisions of the Civil Aeronautics Act to the other parties in the proceeding."*

The other decisions above cited demonstrate that the Board, until the present case, has consistently refused certification, as between competing applicants, to the applicant who had not applied for the routes found necessary.

A portion of this philosophy, here applicable, is well summed up by Professor John H. Frederick in his work "Commercial Air Transportation" (Revised Edition, 1946) at p. 293:

> "9. Where there are two or more carriers applying for the right to operate over a new route, and where there is a substantial portion of the route in question for which one carrier did not make application, the less comprehensive application has been dismissed by the Board in favor of the more comprehensive."

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*Colonial's application also contained a "catch-all" clause requesting that any certificate be issued to it "'subject to such modification as the public convenience and necessity may require and which the applicant requests or to which it may consent'" (4 C. A. B. at p. 558).

POINT III

IN ANY EVENT THE DECISION BELOW SHOULD BE AFFIRMED IN NOS. 157 AND 159, FOR THE BOARD IN DECIDING ON THE RECORD BEFORE IT THAT PIEDMONT WAS FIT, WILLING AND ABLE TO OPERATE THE TRANSPORTATION CERTIFIED, ACTED ARBITRARILY, CAPRICIOUSLY AND IN DISREGARD OF ITS OWN STANDARDS.

The statute provides that an application "shall be denied" if the Board has not found, among other things, "that the applicant is fit, willing, and able to perform such transportation properly" [Civil Aeronautics Act § 401(d)]. It will be noted that the finding of fitness, willingness and ability is not to be made abstractly but is a finding with respect to "such transportation", that is, the transportation to be certificated.

While the statute does not enumerate the standards which the Board is to apply in determining fitness, willingness and ability, the second section of the act* does emphasize certain factors which the Board is instructed to consider in the performance of its duties and, particularly, in making the finding of public convenience and necessity required as a condition precedent to issuing the certificate here involved. Among the factors to be considered is the regulation of air transportation so as to "assure the highest degree of safety" and, again, so as to "best promote its development and safety". Other factors relate to the efficiency of service, the reasonableness of charges, competition, needs of the postal service, etc.

As in the case of similar legislation, the power conferred by Congress upon the Board with reference to finding an applicant fit, willing and able, will not be held so indefinite "as

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*52 Stat. 980, 49 U. S. C. § 402; App. A, p. 1, *infra*.

to confer an unlimited power"; on the contrary, the requirement "is to be interpreted by its context", by the nature of the air carrier business and "by the scope, character and quality of services"*.

The Board has itself established the following tests entirely consistent with the legislation and the obvious Congressional intent. An applicant, in order to be found fit, willing and able must show (1) "a proper organizational basis for the conduct of air transportation", (2) "a plan for the conduct of *the* service made by personnel shown to be competent in such matters", and (3) "the availability of adequate financial resources" (*Pacific Case*, 7 C. A. B. 209, 228). These tests have long been applied by the Board (*American Export Air. Temporary New York-Foynes Ser.*, 3 C. A. B. 294, 298; *North Central Case*, 7 C. A. B. 639, 663). Indeed, they have received judicial recognition (*Braniff Airways* v. *Civil Aeronautics Board*, 79 App. D. C. 341, 342, 147 F. 2d 152, 153).

In addition, applicants for local service such as involved in the present case have been made subject to the following requirement (*Local, Feeder, and Pick-up Air Service*, 6 C. A. B. 1, 4):

> "With respect to showing a justifiable expectation of success at a reasonable cost to the Government, it will be incumbent upon *each applicant to meet the test* of public convenience and necessity *by showing* a need for the service, the probable use that will be made of it, the effect on existing air services, and a cost to the Government in mail compensation bearing a reasonable relationship to these elements and to the character and quality of the service proposed."

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*Quotations from the opinion in *Federal Radio Comm'n* v. *Nelson Bros. Co.*, 289 U. S. 266, 285, quoted in *Nat. Broadcasting Co.* v. *U. S.*, 319 U. S. 190, 216.

In the present case, Piedmont did not offer one scintilla of evidence relating to the east-west transportation certified. It presented no plan whatever for the conduct of the service covered by the certification; it presented no evidence as to its competency to operate the route certified; it presented no schedules, no plans for the utilization of airports, no weather data, no time-saving data, no data as to traffic potentials, no revenue estimates, no cost estimates. There is, indeed, nothing in this record from which the Board could conclude, upon the basis of its own standards, that Piedmont was fit, willing and able to operate the certificated transportation.

Piedmont, as well as all other applicants and the Board itself, understood the type of evidence required to establish fitness, willingness and ability; Piedmont offered in evidence (for the routes for which it had applied, but not the routes for which it was certificated) proposed schedules and fares (R. 360-6), traffic estimates (R. 375), computation of passenger revenues (R. 401), estimates of costs and operating expenses (R. 384-98), computations of flight miles and hours (R. 399-400), and a profit and loss summary, including estimated mail pay to be received from the Government (R. 383).

Not only was this evidence directed exclusively at Piedmont's proposed system east of the Appalachian Mountains, without any reference whatever to the routes certificated by the Board, but this evidence was based specifically "on the performance of the Noorduyn Norseman V, having a passenger capacity of six and a crew of two" (R. 368). This small plane was chosen because "it will operate in and out of small fields safely" (R. 368) and because all proposed schedules were not only during daylight hours but were based upon the theory

of contact flight (R. 368, 442). The plane thus selected as the basis for the only plan for the operation of any service submitted by Piedmont was a plane which *concededly had never received an air-worthiness certificate for scheduled passenger operation** (R. 460).

The present argument that the Board in its specialized wisdom might overlook the absence of all relevant data and still find Piedmont fit, willing and able is contrary not only to the general rules laid down by the Board, as above indicated, but is contrary to specific decisions made by the Board under the very statutory provisions here involved.**

In *Middle Atlantic Area Case*, 9 C. A. B. 131, the Board found that public convenience and necessity required service, roughly, from Atlantic City, Baltimore and Washington, across the Appalachian Mountains to Pittsburgh (9 C. A. B. at pp. 176-7). Atlantic Central Airlines had applied for, had proposed a plan and had offered evidence for routes running north and south, east of the Appalachian Mountains, in New Jersey and Pennsylvania, between Philadelphia and Binghamton, and also between Allentown and New York (9 C. A. B. at p. 177). Thus, Atlantic Central was in substantially the same situation as Piedmont here. Public convenience and necessity for east-west routes having been found, it had submitted a plan pri-

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*Even if this single-engined plane had been approved for certificated transportation, the Board would never have permitted its use over the mountainous routes covered by the certificate issued to Piedmont. *Local, Feeder, and Pick-up Air Service*, 6 C. A. B. 1, f. n. 1 at p. 7. Of course Piedmont proposed the use of this plane only on the routes for which it had applied and these were over relatively level ground and specifically avoided the mountains (see R. 416-8; 553).

**These decisions, to be sure, are not binding as *stare decisis* but should be given weight as administrative constructions of the requirements of the Civil Aeronautics Act; these decisions are also of consequence in the determination that the Board's action here was capricious. See *Woko, Inc.* v. *Federal Communications Commission*, 80 App. D. C. 333, 153 F. 2d 623, 631.

marily for the operation of a north and south service. For that very reason, Atlantic Central's application was summarily rejected by the Board, in the following language (9 C. A. B. at p. 177):

> "Atlantic Central's application is concerned primarily with north-south New Jersey service with Pennsylvania service proposed between Philadelphia and Binghamton and between Allentown-Bethlehem and New York. *No operational plan was submitted for the service we have found to be required.*"

In *North Central Case*, 7 C. A. B. 639, 674, *supra*, Midwest Airlines was rejected among other reasons because "Its plan of operation and all estimates of revenues, expenses, and capital expenditures were based" on its proposed operation but not on the operation found necessary for the public convenience. And in *West Coast Case*, 6 C. A. B. 961, *supra*, the Board, in refusing to certificate Los Angeles Airways, which had submitted a plan of operation for transportation different from that found required, pointed out (p. 997):

> "No traffic evidence or cost data or other information bearing upon an operation similar to that herein involved were submitted by Los Angeles."

The Board, itself, thus has held that, in order to find an applicant fit, willing and able under the Civil Aeronautics Act, it must have before it a plan of operation by that applicant covering the system of transportation for which public convenience and necessity has been found. The submission of a plan covering other service is insufficient.

Following this principle, the Board in *Texas-Oklahoma Case*, 7 C. A. B. 481, 527, denied a certificate to Community Air Service because "its plans were predicated upon a different

type of operation" from that found necessary for the public convenience.

In the very case in which Piedmont received its certificate, the Board utilized this principle to dismiss from consideration parties who had applied for and submitted plans covering service different from that found required by public convenience and necessity. Prairie Airlines was rejected because (7 C. A. B. at pp. 896-7; R. 565):

> "The applicant has not presented any plans indicating that it would or could operate a system such as that found to be required in this proceeding. Accordingly, the application of Prairie will be denied."

Seaboard Air Transport Company was rejected for a similar reason (7 C. A. B. at p. 900; R. 565).

The Board has, indeed, gone even further and has rejected applicants who had submitted some plans relating to the transportation to be certified but had not submitted them with sufficient definiteness or detail. Thus, in *Trans-Southern Air., et al., Amarillo-Oklahoma City Op.*, 2 C. A. B. 250, 254, an application was denied because applicant's plans were vague and "so completely unsupported by evidence as to the cost of such service that we are unable to find applicant presently fit, willing, and able to render service * * *".*

It is impossible to reconcile the foregoing decisions with the issuance of a certificate to Piedmont in the present case. Piedmont submitted no plan at all for the operation of the

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*See also *North Central Case*, 7 C. A. B. 639, 663 (Bos application rejected because plans of operation furnished "were hazy and indefinite"); and *Delta Air. et al., Service to Atlanta and Birmingham*, 2 C. A. B. 447, 488 (rejecting Southern Airlines because of indefiniteness of plans and inability to determine therefrom type of equipment or number of planes required).

service found to be required. Piedmont did not submit any evidence as to the cost of such service or as to the mail pay subsidy which the Government would be expected to pay to Piedmont in the event of its certification.*

Furthermore, the certification of Piedmont, on the basis of a plan employing not only a single-engined plane but one having no certificate of air-worthiness, is contrary to the Board's rule in rejecting an applicant whose plans did not, on their face, comply with elementary safety requirements. In *All American Aviation, Pick-up, Delivery Service*, 2 C. A. B. 133, 152, the Board stated its rule as follows:

> "Although the actual checking and enforcement of safety standards in air transportation is a function distinct from that of issuance of certificates of convenience and necessity, the former being within the province of the Administrator of Civil Aeronautics, the fact that an application for a certificate of convenience and necessity relates to a type of operation not only untried but incompletely planned cannot be disregarded in considering the requirements of the public interest with respect to the disposition of the application."

Adhering to this principle, the Board, in *All American Aviation, Combination Service*, 8 C. A. B. 241, refused to amend the certificate of public convenience and necessity of All American Aviation, Inc. because it could not conclude "on the basis of the evidence now available to us concerning the safety of the proposed operation, which is still of an experimental nature, that the authorization sought by this applicant should be granted at the present time" (p. 242).

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*The mail pay subsidy follows as a matter of course upon the certification of a carrier to carry mail (Civil Aeronautics Act, §§ 401[m], 406, App. A, pp. V-VI, *infra*).

Without further multiplication of authorities, it is evident that the Board, with the exception of the certification of Piedmont, has consistently found unfit applicants who failed to submit adequate plans for the operation to be certificated. The Board has held that when Congress placed upon it the duty of determining whether applicant was "fit, willing, and able to perform such transportation" as a condition precedent to issuing a certificate, it required the Board to find, from substantial evidence, that applicant had submitted a plan of operation which (1) covered the system found to be required by public convenience and necessity; (2) was based upon a type of operation which could safely be carried on; and (3) included evidence as to the proposed cost of service from which the Board could conclude whether the mail pay requirements of the applicant would be consistent with the public interest.

The present record is devoid of any evidence with respect to Piedmont on any of these three fundamental points.

Not only is there a lack of any evidence to support the conclusion that Piedmont was fit, willing and able, but that conclusion is unsupported by necessary findings. The Board has made no finding that Piedmont submitted a plan to operate the transportation certified. It is not merely a question of unclear or incomplete findings, as in *U. S.* v. *Carolina Carriers Corp.*, 315 U. S. 475, 488-9, but there is an absolute lack of basic findings necessary to support the order (*Florida* v. *United States*, 282 U. S. 194, 215; *Colorado-Wyoming Co.* v. *Comm'n.*, 324 U. S. 626, 634; 2 vom Baur, *Federal Administrative Law*, §§ 564, 568).

The conclusion is inescapable that the Board acted arbitrarily and capriciously in issuing a certificate to Piedmont for routes with respect to which that applicant had failed to meet

the minimum and basic standards established by the Board itself for the certification of carriers.

Conclusion

In No. 158 the determination by the court below that it lacked power to make an order compelling the Board to issue a certificate of public convenience and necessity, either permanent or temporary, to State should be reversed with instructions to issue such order, in Nos. 157 and 159 the judgment below should be affirmed.

November 15, 1949.

Respectfully submitted,

FREDERICK W. P. LORENZEN,
Counsel for State Airlines, Inc.

PHILIP SCHLEIT,
Of Counsel.

APPENDIX A

EXTRACTS FROM CIVIL AERONAUTICS ACT OF 1938 AS AMENDED, 52 Stat. 977, 49 U. S. C. Section 401, *et seq.*

Civil Aeronautics Act, Section 2, 52 Stat. 980, 49 U. S. C. § 402:

"In the exercise and performance of its powers and duties under this chapter, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity—

"(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

"(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

"(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

"(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

"(e) The regulation of air commerce in such manner as to best promote its development and safety; and

"(f) The encouragement and development of civil aeronautics. June 23, 1938, c. 601, § 2, 52 Stat. 980; Reorg. Plan No. IV, § 7, eff. June 30, 1940, 5 Fed. Reg. 2421, 54 Stat. 1235."

Appendix A

Civil Aeronautics Act

Civil Aeronautics Act, Section 401; 52 Stat. 987, 49 U. S. C. § 481:

"§ 481. Certificate of public convenience and necessity

"(a) No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation: *Provided,* That if an air carrier is engaged in such transportation on June 23, 1938, such air carrier may continue so to engage between the same terminal and intermediate points for one hundred and twenty days after said date, and thereafter until such time as the Board shall pass upon an application for a certificate for such transportation if within said one hundred and twenty days such air carrier files such application as provided herein.

"(b) Application for a certificate shall be made in writing to the Board and shall be so verified, shall be in such form and contain such information, and shall be accompanied by such proof of service upon such interested persons, as the Board shall by regulation require.

"(c) Upon the filing of any such application, the Board shall give due notice thereof to the public by posting a notice of such application in the office of the secretary of the Board and to such other persons as the Board may by regulation determine. Any interested person may file with the Board a protest or memorandum of opposition to or in support of the issuance of a certificate. Such application shall be set for public hearing, and the Board shall dispose of such application as speedily as possible.

"(d) (1) The Board shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing, and able

to perform such transportation properly, and to conform to the provisions of this chapter and the rules, regulations, and requirements of the Board hereunder, and that such transportation is required by the public convenience and necessity; otherwise such application shall be denied.

"(2) In the case of an application for a certificate to engage in temporary air transportation, the Board may issue a certificate authorizing the whole or any part thereof for such limited periods as may be required by the public convenience and necessity, if it finds that the applicant is fit, willing, and able properly to perform such transportation and to conform to the provisions of this chapter and the rules, regulations, and requirements of the Board hereunder.

"(e) (1) If any applicant who makes application for a certificate within one hundred and twenty days after June 23, 1938, shall show that, from May 14, 1938, until the effective date of this section, it, or its predecessor in interest, was an air carrier, continuously operating as such (except as to interruptions of service over which the applicant or its predecessor in interest had no control), the Board, upon proof of such fact only, shall, unless the service rendered by such applicant for such period was inadequate and inefficient, issue a certificate or certificates, authorizing such applicant to engage in air transportation (A) with respect to all classes of traffic for which authorization is sought, except mail, between the terminal and intermediate points between which it, or its predecessor, so continuously operated between May 18, 1938, and the effective date of this section, and (B) with respect to mail and all other classes of traffic for which authorization is sought, between the terminal and intermediate points between which the applicant or its predecessor was authorized by the Postmaster General prior to the effective date of this section, to engage in the transportation of mail: *Provided*, That no applicant holding an air-

mail contract shall receive a certificate authorizing it to serve any point not named in such contract as awarded to it and not served by it prior to April 1, 1938, if any other air carrier competitively serving the same point under authority of a contract as awarded to such air carrier shall prove that it is adversely affected thereby, and if the Board shall also find that transportation by the applicant to and from such point is not required by the public convenience and necessity.

"(f) Each certificate issued under this section shall specify the terminal points and intermediate points, if any, between which the air carrier is authorized to engage in air transportation and the service to be rendered; and there shall be attached to the exercise of the privileges granted by the certificate, or amendment thereto, such reasonable terms, conditions, and limitations as the public interest may require. A certificate issued under this section to engage in foreign air transportation shall, insofar as the operation is to take place without the United States, designate the terminal and intermediate points only insofar as the Board shall deem practicable, and otherwise shall designate only the general route or routes to be followed. Any air carrier holding a certificate for foreign air transportation shall be authorized to handle and transport mail of countries other than the United States. No term, condition, or limitation of a certificate shall restrict the right of an air carrier to add or change schedules, equipment, accommodations, and facilities for performing the authorized transportation and service as the development of the business and the demands of the public shall require. No air carrier shall be deemed to have violated any term, condition, or limitation of its certificate by landing or taking off during an emergency at a point not named in its certificate or by operating in an emergency, under regulations which may be prescribed by the Board, between terminal and intermediate points other than those specified in its certificate.

Appendix A

Civil Aeronautics Act

Any air carrier may make charter trips or perform any other special service, without regard to the points named in its certificate, under regulations prescribed by the Board.

"(h) The Board, upon petition or complaint or upon its own initiative, after notice and hearing, may alter, amend, modify, or suspend any such certificate, in whole or in part, if the public convenience and necessity so require, or may revoke any such certificate, in whole or in part, for intentional failure to comply with any provision of this subchapter, or any order, rule, or regulation issued hereunder or any term, condition, or limitation of such certificate: *Provided*, That no such certificate shall be revoked unless the holder thereof fails to comply, within a reasonable time to be fixed by the Board, with an order of the Board commanding obedience to the provision, or to the order (other than an order issued in accordance with this proviso), rule, regulation, term, condition, or limitation found by the Board to have been violated. Any interested person may file with the Board a protest or memorandum in support or in opposition to the alteration, amendment, modification, suspension, or revocation of a certificate.

"(m) Whenever so authorized by its certificate, any air carrier shall provide necessary and adequate facilities and service for the transportation of mail, and shall transport mail whenever required by the Postmaster General. Such air carrier shall be entitled to receive reasonable compensation therefor as hereinafter provided."

Civil Aeronautics Act, § 406, 52 Stat. 998, 49 U. S. C. § 486:

"(a) The Board is empowered and directed, upon its own initiative or upon petition of the Postmaster General or an air carrier, (1) to fix and determine from time to time, after notice and hearing, the fair and reasonable rates of compensation for the transportation of mail by aircraft, * * *

Appendix A

Civil Aeronautics Act

"(b) In fixing and determining fair and reasonable rates of compensation under this section, the Board, considering the conditions peculiar to transportation by aircraft and to the particular air carrier or class of air carriers, may fix different rates for different air carriers or classes of air carriers, and different classes of service. In determining the rate in each case, the Board shall take into consideration, among other factors, * * * and the need of each such air carrier for compensation for the transportation of mail sufficient to insure the performance of such service, and, together with all other revenue of the air carrier, to enable such air carrier under honest, economical, and efficient management, to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense."

Civil Aeronautics Act, Section 1006, 52 Stat. 1024, 49 U. S. C. § 646:

"(a) Any order, affirmative or negative, issued by the Board under this chapter, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 601 of this chapter, shall be subject to review by the circuit courts of appeals of the United States or the United States Court of Appeals for the District of Columbia, upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.

"(b) A petition under this section shall be filed in the court for the circuit wherein the petitioner resides or has his principal place of business or in the United States Court of Appeals for the District of Columbia.

Appendix A

Administrative Procedure Act

"(c) A copy of the petition shall, upon filing, be forthwith transmitted to the Board by the clerk of the court; and the Board shall thereupon certify and file in the court a transcript of the record, if any, upon which the order complained of was entered.

"(d) Upon transmittal of the petition to the Board, the court shall have exclusive jurisdiction to affirm, modify, or set aside the order complained of, in whole or in part, and if need be, to order further proceedings by the Board. Upon good cause shown, interlocutory relief may be granted by stay of the order or by such mandatory or other relief as may be appropriate: *Provided*, That no interlocutory relief may be granted except upon at least five days' notice to the Board.

"(e) The findings of facts by the Board, if supported by substantial evidence, shall be conclusive. No objection to an order of the Board shall be considered by the court unless such objection shall have been urged before the Board or, if it was not so urged, unless there were reasonable grounds for failure to do so.

"(f) The judgment and decree of the court affirming, modifying, or setting aside any such order of the Board shall be subject only to review by the Supreme Court of the United States upon certification or certiorari as provided in sections 346 and 347 of Title 28. June 23, 1938, c. 601, § 1006, 52 Stat. 1024; Reorg. Plan No. IV, § 7, eff. June 30, 1940, 5 Fed. Reg. 2421, 54 Stat. 1235."

EXTRACTS FROM ADMINISTRATIVE PROCEDURE ACT OF 1946, 60 Stat. 237, 5 U. S. C. Section 1001, *et seq.*

Administrative Procedure Act, Section 5, 60 Stat. 239, 5 U. S. C. § 1004:

"In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing,

except to the extent that there is involved (1) any matter subject to a subsequent trial of the law and the facts de novo in any court; (2) the selection or tenure of an officer or employee of the United States other than examiners appointed pursuant to section 1010 of this title; (3) proceedings in which decisions rest solely on inspections, tests, or elections; (4) the conduct of military, naval, or foreign affairs functions; (5) cases in which an agency is acting as an agent for a court; and (6) the certification of employee representatives.

NOTICE

"(a) Persons entitled to notice of an agency hearing shall be timely informed of (1) the time, place and nature thereof; (2) the legal authority and jurisdiction under which the hearing is to be held; and (3) the matters of fact and law asserted. In instances in which private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the times and places for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

PROCEDURE

"(b) The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit, and (2) to the extent that the parties are unable so to determine any controversy by consent, hearing, and decision upon notice and in conformity with sections 1006 and 1007 of this title."

Appendix A

Administrative Procedure Act

Administrative Procedure Act, Section 10, 60 Stat. 243, 5 U. S. C. § 1009:

"Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

Rights of Review

"(a) Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

Form and Venue of Action

"(b) The form of proceedings for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

Reviewable Acts

"(c) Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the re-

view of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

SCOPE OF REVIEW

"(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error."

Appendix A

REGULATIONS OF THE CIVIL AERONAUTICS BOARD

Serial Numbers 284 and 285

Served:

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

August 26, 1943.

NOTE

"The attached revisions of Sections 238.1 and 285.4 of the Economic Regulations were adopted by the Board without circulation to the industry, in view of special and emergency circumstances.

"The revision of Section 238.1 accomplishes the following changes:

"1. Service of notice by applicants for Certificates of Public Convenience and Necessity is no longer required. Notice to the public of the filing of an application will be given by the Board by posting notice of each application in the office of the Secretary and by making the information available to the Press. In addition, the Docket Section will distribute to a mailing list including all of the existing air carriers and other applicants, approximately once each week, a description of all applications filed since the date of the previous distribution.

"2. Applications for domestic routes are to be filed separately from applications for authority to engage in overseas or foreign air transportation. Although such applications may upon occasion be consolidated for hearing, the requirement of separate applications distinguishes between those applications which are and those which are not affected by Section 801 of the Act.

"3. Maps attached to applications no longer are required to include existing service by other air carriers to points involved in the application.

"The revision of Section 285.4 changes the time for accomplishing formal interventions. Hereafter intervening petitions may be filed at any time prior to the first prehearing conference, or, if there is none, not later than 10 days prior to the hearing. It is anticipated that this change will eliminate the necessity for a great many intervening petitions.

"In order that interested persons may be advised of the date for filing petitions of intervention, the Docket Section of the Board will include in its weekly releases, distributed to the mailing list, announcements concerning dates selected for prehearing conferences.

/s/ FRED A. TOOMBS,

Fred A. Toombs,

Secretary.

Attachments."

"Regulations

Serial Number 284

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

At a session of the Civil Aeronautics Board
held in its office in Washington, D. C.
on the 25th day of August, 1943

"The Civil Aeronautics Board, acting pursuant to the Civil Aeronautics Act of 1938, as amended, particularly Sections 205 (a) and 401 thereof, and deeming its action necessary

to carry out the provisions of said Act and to exercise its powers and perform its duties thereunder, hereby makes and promulgates the following regulation:

AMENDMENT NO. 3 OF SECTION 238.1 OF THE ECONOMIC REGULATIONS (Fed. Reg. Vol. 8, No. 177, pp. 12257-8)

APPLICATIONS FOR CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY

"Effective August 25, 1943, section 238.1 of the Economic Regulations is hereby amended in its entirety to read as follows:

SECTION 238.1 OF THE ECONOMIC REGULATIONS

APPLICATIONS FOR CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY

"(a) *Formal Requirements of Applications.* Applications for certificates of public convenience and necessity or amendments thereof, shall meet the requirements set forth in section 285.3 of the Economic Regulations as to (1) execution, number of copies and service; (2) verification; and (3) formal specifications of papers. All pages of an application shall be consecutively numbered and the application shall clearly describe and identify each exhibit by a separate number or symbol. All exhibits shall be deemed to constitute a part of the application to which they are attached.

"(b) *Amendments to Application.* If, after receipt of any application, the Board shall request the applicant to supply it with additional information, such information shall be furnished in the form of an amendment to the original application. All amendments to applications shall be consecutively numbered and shall comply with the requirements of this Regulation as to form, number of copies, verification, and in all other essential respects.

"(c) *Incorporation by Reference.* In general it is desirable that incorporation by reference shall be avoided. However,

where two or more applications are filed by a single carrier, lengthy exhibits or other documents attached to one may be incorporated in the others by reference if that procedure will substantially reduce the cost to the applicant.

"(d) *General Provisions Concerning Contents.* The statements contained in an application shall be restricted to significant and relevant facts. They shall be free from argumentation or from expressions of opinion, except such as may be required by this Regulation.

"Requests for authority to engage in air transportation between points in the continental United States and requests for authority to engage in air transportation to or from any point outside the continental United States shall not be included in the same application.

"Each application shall give full and adequate information with respect to each of the items set forth in this paragraph. In addition, the application may contain such other information and data as the applicant shall deem necessary or appropriate in order to acquaint the Board fully with the particular circumstances of its case. Among other things, every such application shall contain the following information:

"(1) The full name and address of the applicant, the nature of its organization (individual, partnership, corporation, etc.) and the name of the State under the laws of which it is organized.

"(2) A statement that the applicant is a citizen of the United States, as defined by Section 1 (13) of the Act. It is not required that the application shall contain all the evidence which the applicant is prepared to present at the hearing or otherwise in support of such statement, but the application shall at least indicate the nature and result of its investigations in that matter and the character of the evidence it will be prepared to present in support of citizenship.

Appendix A

Regulations of the Board

"(3) An adequate identification of each route for which a certificate is desired, specifying the type or types of service (mail, passengers, and property) to be rendered on each such route, and whether or not such services are to be rendered in scheduled operations. The identification of each route shall name every terminal and intermediate point to be included in the certificate for which application is made.

"(4) A map (which may be attached as an exhibit) drawn approximately to scale showing all terminal and intermediate points to be served, giving the approximate mileages between all adjacent points, and the principal over-all distances.

"(5) A statement as to the type of aircraft applicant proposes to use in the new service and whether such aircraft is presently owned by the applicant.

"(6) If applicant does not hold a certificate of public convenience and necessity authorizing air transportation, the name and type of business of any affiliate, subsidiary, or principal stockholder of applicant engaged in any form of transportation as a common carrier or engaged in any phase of aeronautical activity.

"(e) *Applications for Operations Other than between Fixed Points.*

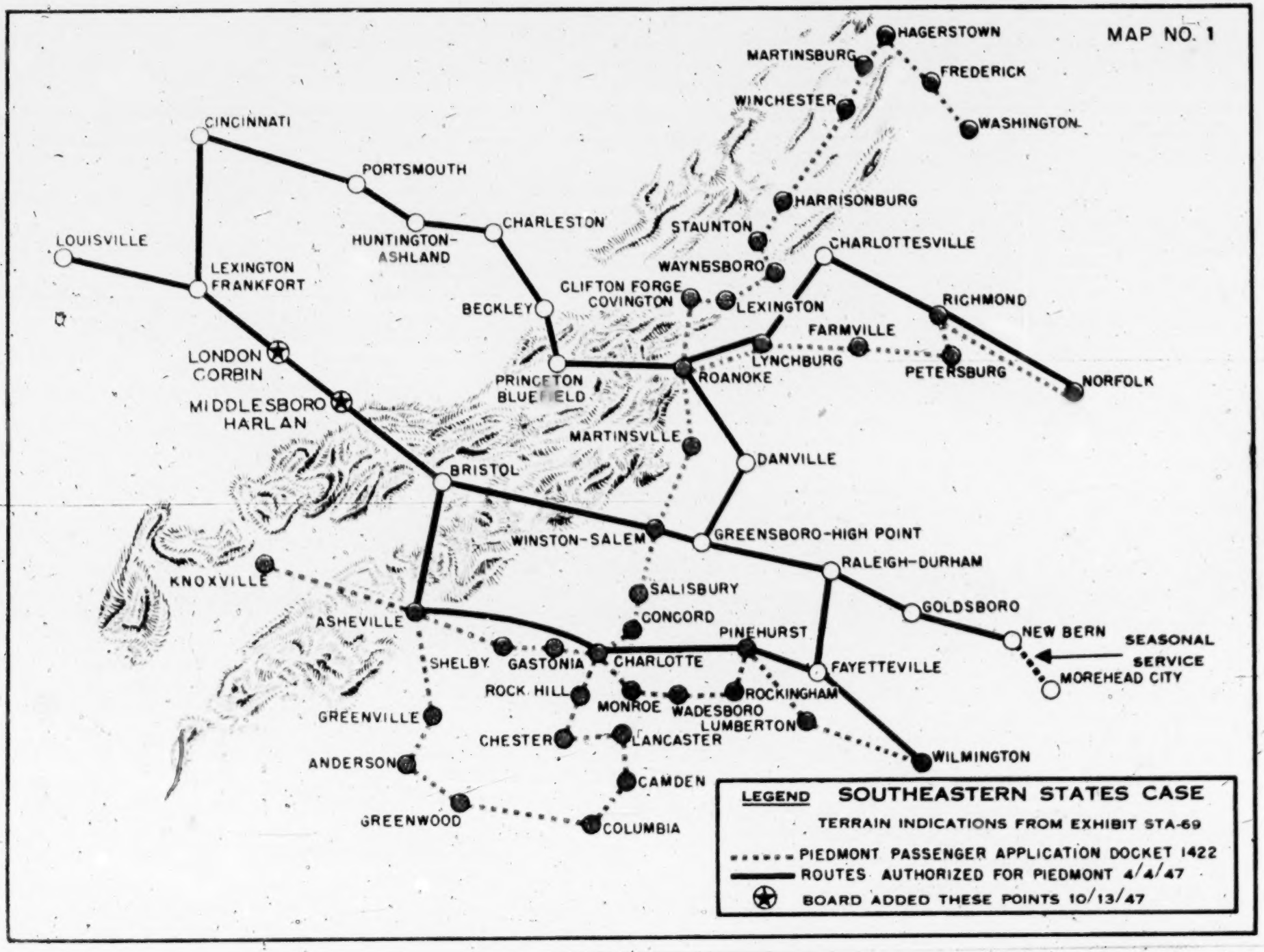
An application for a certificate authorizing operations other than between fixed points, or not having terminal or intermediate points capable of precise description, need comply with the provisions of clauses 3 and 4 of paragraph (d) of this Regulation only to the extent that it shall clearly describe the authorization sought by the applicant.

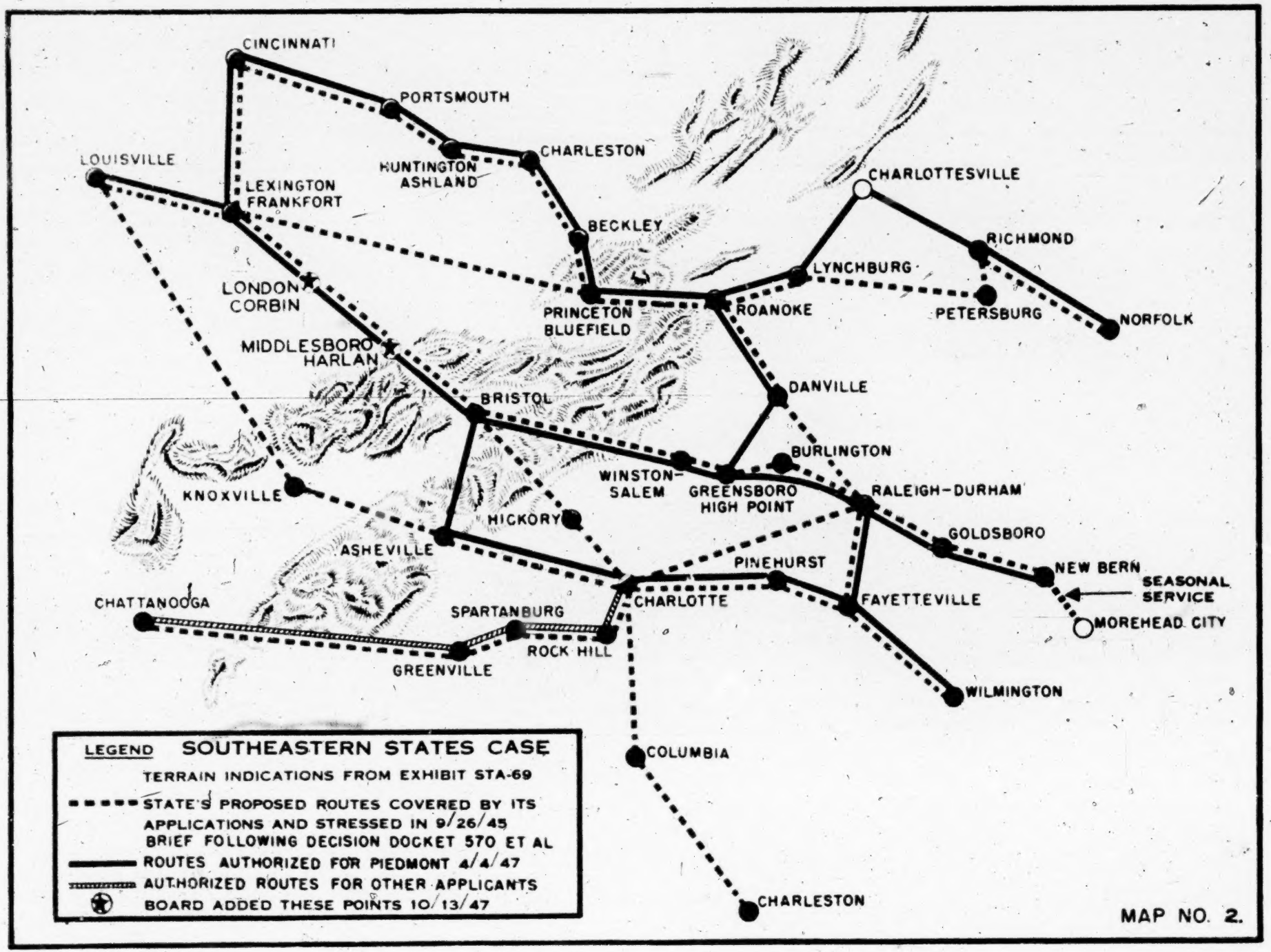
"By the Civil Aeronautics Board:

s/ FRED A. TOOMBS

Fred A. Toombs

[SEAL] *Secretary*"


MAP NO. 1
HAGERSTOWN
MARTINSBURG
FREDERICK
WINCHESTER
WASHINGTON
CINCINNATI
PORTSMOUTH
HARRISONBURG
CHARLESTON
STAUNTON
HUNTINGTON-
ASHLAND
LOUISVILLE
CHARLOTTESVILLE
LEXINGTON
FRANKFORT
WAYNESBORO
CLIFTON FORGE
COVINGTON
LEXINGTON
RICHMOND
BECKLEY
FARMVILLE
LONDON
CORBIN
LYNCHBURG
PETERSBURG
NORFOLK
PRINCETON
BLUEFIELD
ROANOKE
MIDDLESBORO
HARLAN
MARTINSVLLE
DANVILLE
BRISTOL
WINSTON-SALEM
GREENSBORO-HIGH POINT
RALEIGH-DURHAM
KNOXVILLE
SALISBURY
GOLDSBORO
CONCORD
ASHEVILLE
PINEHURST
NEW BERN
SEASONAL
SERVICE
SHELBY
GASTONIA
CHARLOTTE
FAYETTEVILLE
MOREHEAD CITY
ROCK HILL
ROCKINGHAM
MONROE
WADESBORO
LUMBERTON
GREENVILLE
CHESTER
LANCASTER
WILMINGTON
ANDERSON
CAMDEN
GREENWOOD
COLUMBIA
LEGEND
SOUTHEASTERN STATES CASE
TERRAIN INDICATIONS FROM EXHIBIT STA-69
PIEDMONT PASSENGER APPLICATION DOCKET 1422
ROUTES AUTHORIZED FOR PIEDMONT 4/4/47
BOARD ADDED THESE POINTS 10/13/47


CINCINNATI
PORTSMOUTH
CHARLESTON
LOUISVILLE
HUNTINGTON
ASHLAND
LEXINGTON
FRANKFORT
BECKLEY
CHARLOTTESVILLE
RICHMOND
LONDON
CORBIN
LYNCHBURG
PRINCETON
BLUEFIELD
ROANOKE
PETERSBURG
NORFOLK
MIDDLESBORO
HARLAN
DANVILLE
BRISTOL
BURLINGTON
WINSTON-
SALEM
GREENSBORO
HIGH POINT
RALEIGH-DURHAM
KNOXVILLE
HICKORY
GOLDSBORO
ASHEVILLE
PINEHURST
NEW BERN
SEASONAL
SERVICE
CHATTANOOGA
SPARTANBURG
CHARLOTTE
FAYETTEVILLE
MOREHEAD CITY
ROCK HILL
GREENVILLE
WILMINGTON
COLUMBIA
CHARLESTON
LEGEND
SOUTHEASTERN STATES CASE
TERRAIN INDICATIONS FROM EXHIBIT STA-69
STATE'S PROPOSED ROUTES COVERED BY ITS APPLICATIONS AND STRESSED IN 9/26/45 BRIEF FOLLOWING DECISION DOCKET 570 ET AL
ROUTES AUTHORIZED FOR PIEDMONT 4/4/47
AUTHORIZED ROUTES FOR OTHER APPLICANTS
BOARD ADDED THESE POINTS 10/13/47
MAP NO. 2.